(27,278)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 523.

O. O. ASKREN, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, ET AL., APPELLANTS,

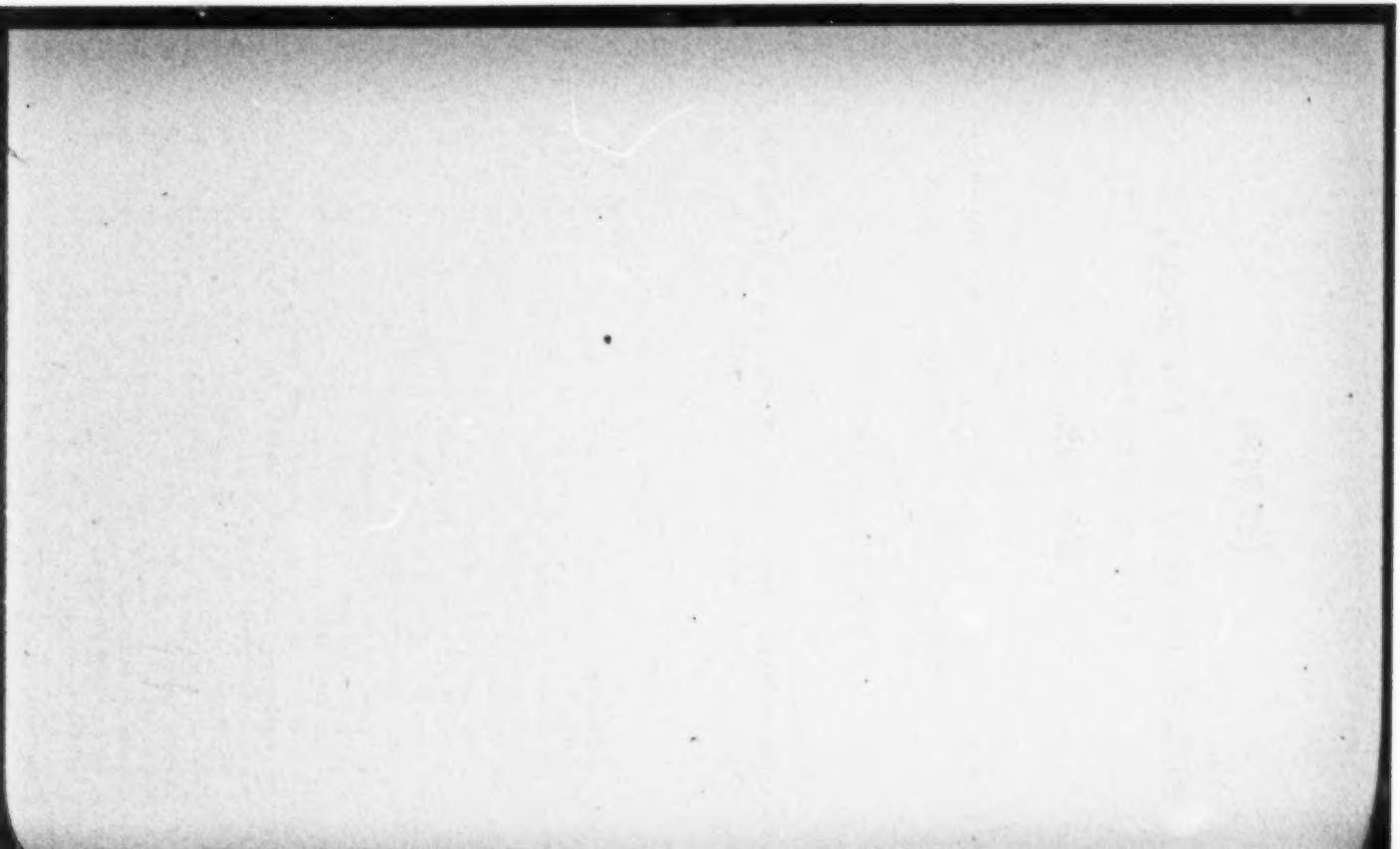
vs.

THE TEXAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1919.



1 *Citation.*

United States of America to the Texas Company, Greeting:

You are hereby cited and admonished and to appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, sixty (60) days after this citation bears date, pursuant to an appeal allowed and filed in the office of the Clerk of the United States District Court for the District of New Mexico, wherein O. O. Askren, Attorney General of the State of New Mexico, Charles U. Strong, Treasurer of the said State, Manuel Martinez, Secretary of State of the said State, and Alexander Read, District Attorney of the First District Attorney's District of the said State are appellants and you are appellee, to show cause, if any there be, why the decretal order rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals of the Eighth Circuit this 17th day of July, 1919.

WALTER H. SANBORN,
Presiding Judge, etc., and One of the Judges Constituting a Special Tribunal in said Cause under Section 266 of the Judicial Code.

SANTA FE, N. M., July 22, 1919.

Due service of the above and foregoing citation on appeal is hereby admitted this 22nd day of July, 1919.

E. R. WRIGHT,
Attorney for Plaintiff (Appellee).

2 In the United States District Court for the District of New Mexico.

Be it remembered, that heretofore, to-wit: on the 26th day of June, A. D. 1919, there was filed in the United States District Court for the District of New Mexico, in the office of the Clerk thereof, a Bill of Complaint, which said Bill of Complaint is in the words and figures as follows, to-wit:

In Equity. No. 681.

THE TEXAS COMPANY, a Corporation, Plaintiff,

v.

O. O. ASKREN, as Attorney General of the State of New Mexico; CHARLES U. STRONG, as State Treasurer of the State of New Mexico; MANUEL MARTINEZ, as Secretary of State of the State of New Mexico, and ALEXANDER READ, as District Attorney of the First Judicial District of the State of New Mexico, Defendants.

Bill of Complaint.

To the Honorable Colin Neblett, Judge of the District Court of the United States in and for the District of New Mexico:

The Texas Company, a corporation duly organized under and by virtue of the Laws of the state of Texas, and a citizen of said state having its principal office at Houston, Texas, brings this its bill against O. O. Askren, as Attorney General of the State of New Mexico, Charles U. Strong as Treasurer of the State of New Mexico, Manuel Martinez as Secretary of State of the State of New Mexico, and Alexander Read as District Attorney of the First Judicial District of the State of New Mexico, all citizens of the state of New Mexico, residing at Santa Fe, in said state.

And for its cause of action against the defendants states:

1. That the plaintiff, The Texas Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Texas, and has its principal office at the city of Houston, in the state of Texas, and is a citizen and resident of said state of Texas; that it is now and at all times hereinafter named has been duly authorized to do business within the state of New Mexico; that
3 the defendant O. O. Askren, is the duly elected, qualified and acting Attorney General of the state of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe, in said state; that the defendant Charles U. Strong is the duly elected, qualified and acting Treasurer of the state of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe in said state; that the defendant Manuel Martinez is the duly elected, qualified and acting Secretary of State of the state of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe, in said state; that the defendant Alexander Read is the duly elected, qualified and acting District Attorney of the first judicial district of the State of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe, in said state.

2. That the amount in controversy in this suit exceeds the sum of three thousand dollars ($3,000) exclusive of interest and costs, and involves a question arising under the constitution and laws of the

United States with respect to the validity, when tested by the constitution of the United States, of that act of the legislature of the state of New Mexico entitled: "An Act Providing for an Excise Tax Upon the Sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Retail Dealers Therein: Providing for the Inspection of Gasoline, and Making it Unlawful to sell Gasoline Below a Certain Grade without Notifying the Purchaser; Providing Penalties for Violations of this Act, and For Other Purposes," approved March 17th, 1919; that it is specially claimed in this suit by the plaintiff that said act of the legislature of the state of New Mexico is unconstitutional and in violation of Section 8 of Article 1 of the Constitution of the United States which vests in the Congress the exclusive power to regulate commerce between the states, and that said act also is in violation of section 10 of Article I of the Constitution of the United States which prohibits any state without the consent of the Congress, from laying any duties upon imports
4 or exports except such as are absolutely necessary for the execution of its inspection laws, and this suit is between citizens of different states.

3. That the plaintiff is, and at all times herein named has been, engaged in business as a merchant and in buying and selling gasoline and other petroleum products; that in the usual and regular course of its business the plaintiff purchases gasoline in the states of Texas and Oklahoma, and from said states ships gasoline into the state of New Mexico, there to be sold and delivered to its customers in said state; that in the usual and ordinary method for the conduct of its business which had been adopted and had long been in use prior to the enactment of the statute aforesaid, and which is still in use, the plaintiff purchases in the states of Texas and Oklahoma, or in one of said states, gasoline, and ships said gasoline in tank cars from the state in which purchased into the state of New Mexico, and there, according to its custom and the ordinary method in the conduct of its business, it sells in said tank car or tank cars the whole of the contents thereof to a single customer, and before the package or packages in which the gasoline was shipped have been broken; that in the usual and regular course of its business it purchases gasoline in some one of the states other than New Mexico aforesaid and ships the gasoline so purchased from that state in barrels and in packages containing not less than two (2) 5-gallon cans into the State of New Mexico, and there, in the usual and ordinary course of its business, without breaking said barrels or packages containing said cans, it is accustomed to sell and was accustomed to sell prior to the enactment of the law aforesaid the gasoline in said original barrels and packages, and according to said custom the said gasoline is sold and delivered to the customers of the plaintiff in precisely the same form and condition as when received in the
5 state of New Mexico; that the gasoline purchased, shipped and sold as aforesaid in said tank cars, barrels and packages containing cans of gasoline is not purchased from a licensed distributor of gasoline in the state of New Mexico, and accordingly the plaintiff, in shipping, selling and disposing of gasoline in the man-

ner aforesaid, is a distributor of gasoline as the term "distributor" is defined by the aforesaid act of the legislature of the state of New Mexico; that the plaintiff has in the state of New Mexico thirteen (13) stations to which it ships gasoline from time to time in the regular course of its business in the manner hereinabove described, and from which it sells gasoline in the manner above stated; that said act of the legislature of the state of New Mexico requires the plaintiff to pay the sum of fifty dollars ($50) per annum for each of its said stations as an annual license tax for the privilege of shipping and selling gasoline in interstate commerce in the manner aforesaid, and said act declares it to be unlawful for any person to distribute or sell gasoline after July first, 1919, without having paid said license tax; that said act requires the plaintiff to make application to the Secretary of State, who is authorized to issue said license, and to accompany said application with a remittance of the amount of the license; that said act further exacts of the plaintiff that it shall pay for the privilege of shipping and selling gasoline in interstate commerce in the manner aforesaid what the said act terms an excise tax of two cents (2¢) for each and every gallon of gasoline so as aforesaid shipped and sold; that for the privilege of engaging in interstate commerce in the manner aforesaid said act further requires that the plaintiff shall render to the State Auditor a monthly statement, in such form as said Auditor shall prescribe, of all gasoline received and sold by the plaintiff during the preceding month, accompanied by a remittance of the amount of money equal in the aggregate to two cents for each gallon shipped and sold in interstate commerce in the manner aforesaid; that it is
6 provided by said act that any person who shall engage or continue in the business of selling gasoline in the State of New Mexico without having paid said taxes for the privilege of doing so shall be deemed guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail for not more than ninety (90) days, or by both such fine and imprisonment, and it is further provided by said act that any person failing to pay said license tax shall be enjoined in an action brought in the name of the state from further distributing or selling gasoline in the state of New Mexico; that it is further provided that to said tax shall be added as a penalty five per cent (5%) of the amount thereof, and a monthly interest of one per cent (1%) until it shall be paid, and that it shall be the duty of the State Treasurer to cause suit to be brought in the name of the state to collect such tax, penalty and interest, and it is declared to be the duty of the Attorney General of the State of New Mexico and the District Attorney to commence and prosecute such suit or suits at the request of the Treasurer; that said taxes constitute an unlawful burden upon interstate commerce, and the act of the legislature aforesaid imposing such taxes for the privilege of engaging in interstate commerce as aforesaid is in conflict with those provisions of the Constitution of the United States hereinabove mentioned and is absolutely void; that said act of the legislature of the state of New

Mexico provides for the appointment of inspectors, one for each of the eight judicial districts of the state, but said inspectors are not required by said act to inspect any gasoline sold or used in said state, and no inspection of gasoline sold in the state of New Mexico is required to be made; that all gasoline sold, used or distributed
7 in the State of New Mexico is imported into the state in interstate commerce, and no gasoline is produced in the state of New Mexico; that in addition to the sales of gasoline as aforesaid the plaintiff ships gasoline as aforesaid from some or all of the states aforesaid in tanks, barrels, or packages, and sells said gasoline so shipped from said tanks, barrels and packages in such quantities as the purchaser desires.

That upon and after the first day of July, 1919, unless prevented by writ of injunction of this Honorable Court, the defendants will seek to enforce the said unconstitutional act of the legislature of New Mexico, and unless the plaintiff submits to the unlawful exactions and pays the said unlawful charges for the privilege of continuing in business defendants will enjoin the plaintiff from the conduct of its business and will cause the officers and agents of the plaintiff at each and all of its various stations aforesaid to be arrested, prosecuted and fined and if it continues to carry on and conduct its business in interstate commerce as aforesaid without paying to the state of New Mexico the sums of money exacted by said act for the privilege of doing so suits will be started from time to time for the collection of said unlawful exactions for the privilege of engaging in interstate commerce, and the plaintiff's business destroyed or materially injured, and the plaintiff will be subjected to the burdens of a multiplicity of suits to enforce the collection of said unlawful exactions, and its officers and agents will be hampered and restrained by arrests and prosecutions unless it submits to said unlawful exactions; that the plaintiff has no plain, adequate or complete remedy at law by reason of the matters and things hereinabove set forth, and unless this court of equity takes jurisdiction hereof and grants plaintiff the injunction as herein prayed, the plaintiff will suffer great and irreparable injury as hereinbefore set forth; that
8 immediate and irreparable injury and damage will result to the plaintiff before this cause can be heard on notice duly and regularly given, unless a temporary restraining order is granted.

Wherefore, forasmuch as the plaintiff is without any adequate remedy at law, and to the end that the plaintiff may obtain relief in this court of equity, where such matters are properly cognizable, plaintiff prays:

That your Honor grant unto the plaintiff a writ of subpœna directed to the said defendants and each of them requiring each of them to answer this bill of complaint, but not under oath, an answer under oath being hereby expressly waived as to each of the defendants; that a temporary restraining order be issued against defendants and each of them and all persons acting through or under them or under the direction of either or any of them enjoining them and each of them from taking any action looking to the enforcement of the aforesaid act of the legislature of the state of New Mex-

ico, and that said act be declared by this court to be unconstitutional and void, and that this Honorable Court, upon issuing said temporary restraining order appoint a day when the parties may be heard upon plaintiff's application for a preliminary injunction, and that upon said day the court grant unto this plaintiff its preliminary injunction to the same effect as aforesaid, and that upon final hearing said injunction be made perpetual; and that the plaintiff have such other and further relief, both general and special, as it may appear in equity to be entitled to, and that it have judgment for costs of suit.

E. R. WRIGHT,
S. B. DAVIS, JR.,
MILTON SMITH,
CHAS. R. BROCK,
W. H. FERGUSON,
Solicitors for Plaintiff.

9 STATE OF NEW MEXICO,
County of Santa Fe, ss:

E. R. Wright, being first duly sworn on oath deposes and says: That he is one of the solicitors for the plaintiff; that he has read the foregoing bill of complaint and knows the contents thereof, and that the statements thereon are true to the best of his knowledge, information and belief; that he makes this verification on behalf of the plaintiff because it is a corporation.

E. R. WRIGHT.

Subscribed and sworn to before me this 26 day of June, A. D. 1919.

My commission expires Oct. 2, 1920.

[NOTARIAL SEAL.] ROBERT L. ORMSBEE,
Notary Public.

(*Motion to Dismiss Bill.*)

Filed July 1, 1919.

Come now the defendants herein and move the Court to dismiss the bill herein filed, and for their reasons for said motion say:

That the said bill does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

Wherefore, defendants pray that the bill herein be dismissed with their costs.

O. O. ASKREN,
Attorney General;
A. B. RENEHAN,
Special Assistant Attorney General;
HARRY S. BOWMAN,
Assistant Attorney General;
NICOLAS D. MEYER,
Assistant Attorney General,
Solicitors for Defendants.

I, Harry S. Bowman, Solicitor for the defendants in the above entitled matter, do hereby certify that the foregoing motion in my opinion is well founded in law.

HARRY S. BOWMAN,
Solicitor for Defendants.

Charles U. Strong being first duly sworn, upon his oath, says that he is one of the defendants in the above entitled action, and that the foregoing motion is not interposed for the purposes of delay.

CHARLES U. STRONG.

Subscribed and sworn to before me this 1st day of July, A. D. 1919.

[NOTARIAL SEAL.] W. E. GRIFFIN,
Notary Public.

My commission expires July 6, 1921.

(*Order Overruling Motion to Dismiss.*)

Filed July 3, 1919.

This cause came on to be heard at this term upon the motion of the defendants to dismiss and was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that said motion be, and the same hereby is overruled, to which the defendants and each of them except, and it is further ordered that the defendants be given ten (10) days to answer the bill of complaint herein.

Done in open court this 3rd day of July, 1919.

By the Court:

COLIN NEBLETT,
United States District Judge.

(*Order Granting Temporary Restraining Order.*)

Filed and Entered July 5, 1919.

This cause came on to be further heard at this term upon the application of the plaintiff for a temporary restraining order, and it appearing that due notice of the application was given to the defendants and each of them *and* said application was argued by counsel, both for the plaintiff and the defendants, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the defendants and each of them be restrained from taking any action looking to the enforcement as against the plaintiff in this cause, of that Act of the Legislature of the State of New Mexico approved March 17, 1919 and entitled:

"An Act Providing for an Excise Tax upon the Sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Re-

tail Dealers Therein; Providing for Collection and Application of such Taxes; Providing for the Inspection of Gasoline and Making it Unlawful to Sell Gasoline Below a Certain Grade Without Notifying Purchaser Thereof; Providing Penalties for Violations of this Act and for Other Purposes."

which said restraining order shall become effective upon the execution of bond by the plaintiff running to the State of New Mexico in the penal sum of Five Thousand Dollars, conditioned as required by law and filed in this suit with sureties to be approved by the Clerk of this Court.

It is further ordered that the 21st day of July, 1919, be and is hereby designated as the time when the plaintiff may be heard upon its application for a preliminary injunction.

12 Done in open Court this 5th day of July, A. D. 1919.

By the Court:

COLIN NEBLETT,
United States District Judge.

(*Bond on Temporary Restraining Order.*)

Filed July 5, 1919.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Know all men by these presents, That we, The Texas Company, a corporation under the laws of the State of Texas as principal, and the United States Fidelity and Guaranty Company, a corporation under the laws of the State of Maryland, as its surety, are held and firmly bound unto the State of New Mexico in the penal sum of Five Thousand Dollars, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and our respective successors and assigns, firmly by these presents.

Sealed with our seals and dated this 5th day of July, 1919.

The condition of the above bond and obligation is such that whereas, the above bounden, The Texas Company, a corporation has filed its bill of complaint in the United States District Court for the District of New Mexico against the above named O. O. Askren, as Attorney General of the State of New Mexico, Charles U. Strong, as State Treasurer of the State of New Mexico, Manuel Martinez, as Secretary of State of the State of New Mexico, and Alexander Read, as District Attorney of the First Judicial District of the State of New Mexico, praying, among other things, for a temporary restraining order to restrain the said defendants and each of them from taking any action looking to the enforcement as against the said The Texas Company, a corporation, of that Act of the Legislature of the State of New Mexico approved March 17, 1919 and entitled:

"An Act Providing for an Excise Tax upon the Sale or
13 Use of Gasoline and for a License Tax to be Paid by Distributors and Retail Dealers Therein; Providing for Collec-

tion and Application of Such Taxes; Providing for the Inspection of Gasoline and making it Unlawful to Sell Gasoline Below a Certain Grade without notifying Purchaser Thereof; Providing Penalties for Violations of This Act and for Other Purposes."

And, whereas, said court has granted said temporary restraining order for that purpose, according to the prayer of said bill to become effective upon the execution of a bond by the said, The Texas Company running to the State of New Mexico in the said sum of Five Thousand Dollars;

Now therefore, if the above bounden, The Texas Company, a corporation, its successors and assigns, shall well and truly pay or cause to be paid to the said State of New Mexico, and to any official thereof as may be required by the terms of said Act above referred to, any and all fees and taxes, and also any and all costs and damages that may be awarded against the said, The Texas Company, in case said temporary restraining order shall be dissolved, then this obligation to be void; otherwise to be and remain in full force and effect.

THE TEXAS COMPANY,
By E. R. WRIGHT,
Its Attorney.
UNITED STATES FIDELITY AND GUARANTY COMPANY,

[SEAL U. S. F. & G. CO.]

By C. A. BISHOP,
Its Att'y-in-fact.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 5th day of July 1919 before me personally appeared E. R. Wright, to me known to be the person who executed the foregoing instrument as the attorney for The Texas Company, on behalf of the said The Texas Company, a corporation, and acknowledged that he executed the same as the free act and deed of the said
14 The Texas Company.

In witness whereof, I have hereunto set my hand and notarial seal the day and year last in this certificate above written.

[NOTARIAL SEAL.] IDA C. KRICK,
Notary Public, Santa Fe County, N. M.

My Commission Expires Jan. 9, 1922.

Approved this 5th day of July, 1919.

COLIN NEBLETT,
U. S. Dist. Judge.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 5th day of July 1919, before me personally came C. A. Bishop, known to me to be the attorney-in-fact of the United States

Fidelity and Guaranty Company, a corporation described in and which executed the within and foregoing bond of The Texas Company as a surety thereon, and who being by me duly sworn, deposes and says, that he resides in the City of Santa Fe, State of New Mexico; that he is the attorney-in-fact of said Company and knows the corporate seal thereof; that the said United States Fidelity and Guaranty Company is duly and legally incorporated under the laws of the State of Maryland; that the seal affixed to the within bond is the corporate seal of said Company and was thereby affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as attorney-in-fact of said Company; and that the signatures of said C. A. Bishop subscribed to said bond is the genuine handwriting of C. A. Bishop and was thereto subscribed by order and authority of said Board of Directors; and that the assets of said Company unencumbered and liable to execution exceed its claims, debts and liabilities of every nature more than the sum of One Million Dollars; that the United States Fidelity and Guaranty Company has complied with all the laws of the State of New Mexico relating to surety companies doing business in said State and is duly licensed and legally authorized by such State to qualify as sole surety on the bond hereto annexed.

C. A. BISHOP,
Deponent's Signature.

Sworn to and acknowledged *to* before me, and subscribed in my presence this 5th day of July, 1919.

IDA C. KRICK,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires January 9th, 1922.

(*Stipulation Waiving Presence of Hon. Colin Neblett, U. S. District Judge, District of New Mexico, as One of Three Judges to Hear Application for a Preliminary Injunction.*)

Filed July 11, 1919.

It is hereby stipulated and agreed by and betwen the parties hereto that the presence of the Hon. Colin Neblett, United States District Judge in and for the District of New Mexico as one of the three judges to hear the plaintiffs' application for a preliminary injunction in the above entitled — under the provisions of Section 266 of the Judicial Code is hereby waived, and

It is further stipulated and agreed by and between the parties hereto, that the Senior Judge of the Eighth Circuit Court of Appeals may call in any other district or circuit judge to sit in the place and stead of the said Colin Neblett, District Judge, upon the hearing of Plaintiffs' said application for a preliminary injunction in the above entitled causes.

Dated at Santa Fe, New Mexico, this 11th day of July, 1919.

16 CHARLES R. BROCK,
S. B. DAVIS, JR.,
E. R. WRIGHT,
Attorneys and Solicitors for the Plaintiffs.
O. O. ASKREN,
Attorney General of the State of New Mexico, on Behalf of Defendants,
By HARRY S. BOWMAN,
Assistant Attorney General.

(Stipulation Setting Cause for Hearing at St. Paul, Minn., for July 15, 1919.)

Filed July 10, 1919.

It is hereby stipulated and agreed by and between the parties hereto, that the plaintiffs' applications for a temporary injunction in the above entitled causes, heretofore set for hearing at Santa Fe, New Mexico on the 21st day of July 1919, may be heard at Saint Paul, Minn., on the 15th day of July, 1919, at the hour of ten o'clock in the forenoon of said day, and that said hearing be had at the Court Room of the Circuit Court of Appeals for the Eighth Circuit, or at such other place in the said City of Saint Paul as may be convenient to the court.

Dated at Santa Fe, New Mexico, this 9th day of July, 1919.

CHARLES R. BROCK,
S. B. DAVIS, JR.,
E. R. WRIGHT,
Attorneys and Solicitors for Plaintiffs.
O. O. ASKREN,
Attorney General, State of New Mexico,
By HARRY S. BOWMAN,
Assistant Attorney General.

16½ *(Order of Reference to Three Judges.)*

Filed Aug. 23, 1919, nunc pro tunc as of July 9, 1919.

Application having been heretofore made herein for a hearing before three judges, under the provisions of Section 266 of the Judicial Code, upon the application of the plaintiff herein for an interlocutory injunction, restraining the enforcement of a certain statute of the State of New Mexico on the ground that the same was in contravention of the constitution of the United States;

And the parties hereto having stipulated that said application for an interlocutory injunction herein may be heard before the Senior Judge of the Circuit Court of Appeals for the Eighth Circuit, and

such other judges as said Senior Judge may call to his assistance, at St. Paul, Minn.;

Now, therefore, it is

Ordered, that this cause be and the same hereby is referred to the Hon. Walter H. Sanborn, Presiding Judge of the Circuit Court of Appeals for the Eighth Circuit, and to such other two judges as said presiding judge may call to his assistance, for the purpose of hearing and determining said application of the plaintiff for an interlocutory injunction herein.

COLIN NEBLETT,
District Judge.

17 Due and timely notice of plaintiffs' application for a temporary injunction to be made at Saint Paul, Minn., on the 15th day of July, 1919, under the provisions of Section 266 of the Judicial Code, is hereby admitted this 9th day of July, 1919.

O. A. LARRAZOLA,
Governor of New Mexico,
By HARRY S. BOWMAN,
Assistant Attorney General.
O. O. ASKREN,
Attorney General of New Mexico,
By HARRY S. BOWMAN,
Assistant Attorney General, in Person and as Attorney for the Named Defendants.

(*Order Granting Temporary Injunction.*)

Filed and Entered July 15, 1919.

This cause came on to be further heard at this term upon the application of the plaintiffs for a temporary injunction in pursuance of Section 266, of the Judicial Code, and it appearing that due notice of the application was given to the defendants and each of them *and* said application was argued by counsel, both for the plaintiff and the defendants, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the defendants and each of them be restrained until the final judgment in this court or the further order of this court, from taking any action looking to the enforcement as against the plaintiff in this cause, of that Act of the Legislature of the State of New Mexico approved March 17, 1919, and entitled:

"An Act *Provided* for *the* excise Tax upon the Sale or Use of Gasoline and for a license Tax to be paid by distributors and retail dealers therein; providing for collection and application of such
18 taxes; providing for the inspection of gasoline and making it unlawful to sell gasoline below a certain grade without notifying purchaser thereof; providing penalties for violations of this Act and for other purposes."

which said injunction order shall become effective upon the execution of bond by the plaintiff running to the State of New Mexico in the penal sum of $18,000.00 *dollars* conditioned as required by law and filed in this suit with sureties to be approved by the Clerk of the District Court for the District of New Mexico.

Done at St. Paul, Minnesota, this 15th day of July, A. D. 1919.

WALTER H. SANBORN,
Senior Circuit Judge.
JOHN H. COTTERAL,
District Judge.
WILBUR F. BOOTH,
District Judge.

(*Petition for Appeal.*)

Filed July 17, 1919.

Whereas, heretofore a restraining order was granted in said cause on the application of the plaintiff; and

Whereas, thereafter the application of the plaintiff for a temporary injunction, under stipulation, was referred to the special tribunal constituted as shown in the caption hereof; and

Whereas, after due notice, the said application for a temporary injunction against the defendants came on to be heard the 15th day of July, 1919, before said special tribunals, and on said day the writ prayed for was granted, by the decree thereof, whereby the
19 defendants jointly and severally are agreed;

Now come the defendants, by A. B. Renehan, Esq., Special Attorney General of the State of New Mexico, one of their solicitors and pray an appeal from the judgment and decree aforesaid to the Supreme Court of the United States, and herewith submit their assignment of error and prayer for reversal of said judgment and decree, and for dissolution of the writ of injunction granted, and for such other relief as may be proper.

A. B. RENEHAN,
Special Assistant Attorney General of the State of New Mexico, Solicitor for Defendants.

(*Assignments of Error.*)

Filed July 17, 1919.

Now come the defendants and as part of the foregoing petition for appeal *and* assign as errors committed by the said Special Tribunal in granting the temporary writ of injunction in said cause granted, and thereon pray that the judgment and decree of the said special tribunal may be reversed, and the cause remanded with instructions to dissolve the said writ and to dismiss the bill, to-wit:

1. That it appears by the bill of complaint that the annual tax

of $50. per year required to be collected from the plaintiff, by the Act of the Legislature of the State of New Mexico of which complaint is made, is an internal or occupation tax assessed against all persons in the same category or classification as the plaintiff, and that it is not a burden on Interstate Commerce, within the meaning of the Federal Constitution, and the said Special Tribunal erred in holding to the contrary.

2. That the tax of 2¢ per gallon on gasoline is proposed to be levied on sales of gasoline as made, after the commodity has come to a rest and reached its destination in New Mexico, and become commingled with the common property of the State of New Mexico, and not while it is in transit, or while it is in interstate commerce, and the said Court erred in holding to the contrary.

3. That neither the said annual tax of $50. per year or the gallon excise or charge of 2¢ is a tax or charge for the privilege of doing interstate business, but is and will be presumed to be directed only to intrastate commerce, and the said court erred in holding to the contrary.

4. That the taxes mentioned are of a three-fold character: first, for inspection, pro tanto, — the cost thereof as fixed and limited by the act itself, within bounds which on their face are reasonable; second, for occupation in a peculiarly hazardous form of enterprise or business; and, third, for excise or charge upon sale, use or consumption of gasoline, and are lawful and within the permission of the Federal Constitution, and not in any of said respects an imposition upon interstate commerce, in the constitutional sense, but being under the reserve police power of the state in regard to the inspection feature of the law, which is but one of several purposes, and otherwise are matter of domestic and not federal concern, and the said court erred in holding to the contrary.

5. That the court erred in holding that the said taxes are not at least in legitimate part for inspection, and that they constitute a charge for the privilege of doing an interstate business or engaging in interstate commerce.

6. That upon the face of the bill the plaintiff in its business is a localized merchant and subject to the taxes sought to be gathered under the said Act of the New Mexico Legislature.

O. O. ASKREN,
Attorney General of New Mexico;
HARRY S. BOWMAN,
Assistant Attorney General of New Mexico;
A. B. RENEHAN,
Special Assistant Attorney General,
Solicitors for Defendant.

21 (*Order Granting Appeal.*)

Filed and Entered July 17, 1919.

This cause having come on to be heard this 17th day of July, 1919, upon the petition of the defendant- for an appeal to the Supreme Court of the United States from the interlocutory decree of the special tribunal to which it was submitted, granting a temporary writ of injunction against the defendants and each of them, to restrain them from enforcing or attempting to enforce that particular statute of the State of New Mexico, which is the subject matter of the bill of complaint herein, the defendants appearing by A. B. Renehan, Special Assistant Attorney General of the State of New Mexico, one of their solicitors, and the plaintiff appearing by E. R. Wright, Esq., one of its solicitors, and the Court having seen and considered the assignments of error exhibited with the petition for appeal;

It is ordered that an appeal be and the same hereby is granted to the Supreme Court of the United States from the judgment and decree aforesaid.

It is further ordered that the defendants make bond for costs according to the statute and the rule in the penalty of $500.00.

It is further ordered that the Clerk of the United States District Court, without delay, make and transmit to the Clerk of the Supreme Court of the United States a full and true transcript of the proceedings in the said cause, including the complaint, the motion to dismiss, the restraining order, the bond therefor, the order of reference, under Section 266 of the Judicial Code, to three judges, the order granting a temporary injunction, the temporary injunction bond, the petition for appeal, with assignments of error, the order granting the appeal and the cost bond.

22 WALTER H. SANBORN,
One of the Judges of the United States Circuit Court of Appeals of the Eighth Circuit, Presiding Judge Thereof, and One of the Judges of the Special Tribunal in the Cause Aforesaid.

(*Cost Bond.*)

Filed July 17, 1919.

Know all men by these presents: That we, O. O. Askren, Attorney General of the State of New Mexico, Charles U. Strong, Treasurer of the State of New Mexico, Manuel Martinez, Secretary of State of the State of New Mexico, and Alexander Read, District Attorney of the First District Attorney's District of the State of New Mexico, as principals, and United States Fidelity & Guaranty Company, of Baltimore, Maryland, a corporation duly authorized to make bonds in the courts of the United States, as surety, are held and firmly bound unto The Texas Company its successors and assigns in the full and

just sum of Five Hundred ($500.) Dollars, to be paid to the said The Texas Company its successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, and successors, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of July, 1919.

Whereas, lately, on the 15th day of July, 1919, a special tribunal, under Section 266, of the United States Judicial Code, composed of Honorable Walter H. Sanborn, one of the Justice- of the United States Circuit of Appeals of the Eighth Circuit, Honorable John H. Cotteral, and Honorable Wilbur F. Booth, United States District Judges, in a matter pending before it for a temporary injunction on the application of the said The Texas Company as plaintiff, and the principals herein as defendants, judgment was rendered and
23 order made for an interlocutory writ of injunction against the said principals, and the said principals have obtained the allowance of an appeal to the Supreme Court of the United States to reverse the said judgment and order in the aforesaid suit which is depending in the District Court of the United States for the District of New Mexico, and a citation directed to the said The Texas Company citing and admonishing it to be and appear before the Supreme Court of the United States, at the City of Washington, in the District of Columbia, sixty (60) days from and after the date of the said citation:

Now, the condition of the above obligation in such that if the said principals shall prosecute said appeal to effect, and pay all costs, if they fail to make good said plea, then the said obligation to be void; else to remain in full force and virtue.

O. O. ASKREN,
Attorney General of the State of New Mexico,
By A. B. RENEHAN,
His Attorney.
CHARLES U. STRONG,
Treasurer of the State of New Mexico,
By A. B. RENEHAN,
His Attorney.
MANUEL MARTINEZ,
Secretary of State, etc.,
By A. B. RENEHAN,
His Attorney.
ALEXANDER READ,
District Attorney, etc.,
By A. B. RENEHAN,
His Attorney.
UNITED STATES FIDELITY & GUARANTY COMPANY.

[SEAL U. S. F. & G. CO.]

W. A. LANG,
Attorney-in-fact.

GEO. W. ELLIOTT.
EDITH M. COOKE.

24 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 17th day of July, 1919, before me personally appeared A. B. Renehan, to me well known to be the same person described in and who executed the foregoing bond in behalf of and for the principals therein named and acknowledged to me that he executed the same as the free act and deed of the several principals, to-wit: O. O. Askren, etc., Charles U. Strong, etc., Manuel Martinez, etc., and Alexander Read, etc.

In witness whereof I have hereunto set my hand and notarial seal the day and year in this certificate written.

[NOTARIAL SEAL.] JEANNETT N. DAILEY,
Notary Public, Ramsey County, Minnesota.

My Commission expires March 6, 1920.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 17 day of July 1919, before me a Notary Public within and for said County and State, personally appeared W. A. Lang to me personally known, who being by me duly sworn upon oath did say that he is the Agent and Attorney-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said W. A. Lang did acknowledge that he executed the said instrument as the free act and deed of said Company.

[NOTARIAL SEAL.] EDITH M. COOKE,
Notary Public, Ramsey Co., Minn.

My commission expires June 2, 1920.

25 The foregoing bond and the security furnished thereby are hereby approved and the petition for the appeal herein is hereby granted.
July 17, 1919.

WALTER H. SANBORN,
Senior Circuit Judge.

(*Bond on Preliminary Injunction.*)

Filed July 22, 1919.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Know all men by these presents, That we, The Texas Company, a corporation under the laws of the State of Texas, as principal, and the United States Fidelity and Guaranty Company, a corporation under the laws of the State of Maryland, as its surety, are held and firmly bound unto the State of New Mexico, in the penal sum of Eighteen Thousand Dollars, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and our respective successors and assigns, firmly by these presents.

Sealed with our seals and dated this 22nd day of July, 1919.

The condition of the above bond and obligation is such that, whereas, the above bounden, The Texas Company, a corporation, has filed its bill of complaint in the United States District Court for the District of New Mexico, against the above named O. O. Askren, as Attorney General of the State of New Mexico, Charles U. Strong, as State Treasurer of the State of New Mexico, Manuel Martinez, as Secretary of State of the State of New Mexico, and Alexander Read, as District Attorney of the First Judicial District of the State of New Mexico, praying, among other things, for a preliminary injunction restraining and enjoining the said defendants and each of
26 them from taking any action looking to the enforcement as against the said The Texas Company, a corporation of that Act of the Legislature of the State of New Mexico approved March 17, 1919, and entitled:

"An Act providing for an Excise Tax upon the sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Retail Dealers Therein; Providing for Collection and Application of Such Taxes; Providing for the Inspection of Gasoline and Making it Unlawful to Sell Gasoline Below a Certain Grade without notifying Purchaser thereof; Providing Penalties for Violations of This Act and For Other Purposes;"

And, whereas, said court, heretofore, and on the 3rd day of July, 1919, granted a temporary restraining order in accordance with the prayer of said Bill of Complaint; and, whereas, upon the application of plaintiff and upon due notice under the provisions of Section 266 of the Judicial Code of the United States, a special tribunal, duly constituted under the provisions of said Section 266, and consisting of the Honorable Walter H. Sanborn, senior circuit judge of the Eighth Circuit, Honorable John H. Cotteral and Honorable Wilber F. Booth, District Judges, sitting at St. Paul, Minnesota, upon the 15th day of July, 1919, has granted said preliminary injunction, restraining and enjoining said defendants in accordance with the prayer of said Bill of Complaint, to become effective upon the execution of a bond by the said The Texas Company, running to the

State of New Mexico, in the said sum of Eighteen Thousand Dollars;

Now, therefore, if the above bounden, The Texas Company, a corporation, its successors and assigns, shall well and truly pay or cause to be paid to the said State of New Mexico, and to any official thereof as may be required by the terms of said Act above referred to, any and all fees and taxes, and also any and all costs and dam-
27 ages that may be awarded against the said The Texas Company, in case said preliminary injunction shall be dissolved, then this obligation to be null and void; otherwise to be and remain in full force and effect.

THE TEXAS COMPANY,
By E. R. WRIGHT,
Its Attorney.
UNITED STATES FIDELITY AND GUARANTY COMPANY,

[SEAL U. S. F. & G. CO.]

By C. A. BISHOP,
Its Att'y-in-fact.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 22 day of July, 1919, before me personally appeared E. R. Wright, to me known to be the person who executed the foregoing instrument as the attorney for The Texas Company, on behalf of the said The Texas Company, a corporation, and acknowledged that he executed the same as the free act and deed of the said The Texas Company.

In witness whereof I have hereunto set my hand and Notarial Seal, the day and year last above in this certificate written.

[NOTARIAL SEAL.] JOHN J. KENNEY,
Notary Public, Santa Fe County, N. M.

My commission expires June 8, 1920.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 22" day of July, 1919, before me personally came C. A. Bishop, known to me to be the attorney-in-fact of the United States Fidelity and Guaranty Company, a corporation described in and which executed the within and foregoing bond of The Texas Co. as a surety thereon, and who being by me duly sworn, deposes
28 and says, that he resides in the City of Santa Fe, State of New Mexico; that he is the attorney-in-fact of said Company and knows the corporate seal thereof; that the said United States Fidelity and Guaranty Company is duly and legally incorporated under the laws of the State of Maryland; that the seal affixed to the

within bond is the corporate seal of said Company and was thereby affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as attorney-in-fact of said Company; and that the signatures of said C. A. Bishop subscribed to said bond is the genuine handwriting of C. A. Bishop and was thereto subscribed by order and authority of said Board of Directors; and that the assets of said Company, unencumbered and liable to execution exceed its claims, debts and liabilities of every nature by more than the sum of One Million Dollars; that the United States Fidelity and Guaranty Company has complied with all the laws of the State of New Mexico relating to surety companies doing business in said State and is duly licensed and legally authorized by such State to qualify as sole surety on the bond hereto annexed.

C. A. BISHOP,
Deponent's Signature.

Sworn to and acknowledged *to* before me, and subscribed in my presence this 22" day of July, 1919.

[NOTARIAL SEAL.] IDA C. KRICK,
Notary Public.

My Commission Expires Jan. 9" 1922.

The above and foregoing bond is hereby approved as to form, sufficiency and execution this July 22, 1919.

WYLY PARSONS,
Clerk.

29 (*Præcipe for Transcript.*)

Filed Aug. 13, 1919.

To the Clerk of said Court:

Please prepare a transcript of record of the said cause on appeal to the Supreme Court of the United States, containing the following items:

1. The Complaint.
2. The motion to dismiss.
3. The order on motion to dismiss.
4. The restraining order.
5. The bond for restraining order.
6. The order of reference to three judges.
7. The stipulations for hearing before three judges at St. Paul, Minn.
8. The notice of hearing to the Attorney General and Governor of the State of New Mexico.

9. The order granting a temporary injunction.

10. The temporary injunction bond.

11. The petition for appeal.

12. The assignments of error.

13. The order granting the appeal.

14. The cost bond.

15. The citation on appeal with acknowledgment of service thereof.

16. This præcipe.

17. The Clerk's certificate and certificate of costs.

O. O. ASKREN,
Attorney General of the State of New Mexico;
A. B. RENEHAN,
Attorneys for Defendants.

It is hereby stipulated and agreed, by and between counsel for the parties to the above entitled cause, that the above and foregoing præcipe calls for the preparation of a transcript of record in
30 said cause, containing all matters necessary or proper for the consideration of said cause on appeal to the Supreme Court of the United States.

SINCLAIR REFINING COMPANY,
Plaintiff,
By E. R. WRIGHT,
One of Its Attorneys.
O. O. ASKREN,
Attorney General, etc.;
A. B. RENEHAN,
Attorneys for Defendants.

31 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of New Mexico, ss:

I, Wyly Parsons, Clerk of the District Court of the United States for the District of New Mexico, do hereby certify that the foregoing transcript, consisting of 30 pages, constitutes a full, true and correct copy of the proceedings had and orders entered in said cause, as set forth therein; as the same appear on file and of record in this office, with the exception of the citation on appeal, the original of which is attached at page 1 of the foregoing transcript.

The foregoing constitutes the entire transcript in the cause, as indicated by the præcipe for transcript on page 29 thereof, and as stipulated by the parties in said præcipe.

Witness my hand and the official seal of said Court, at Santa Fe, in the District of New Mexico, this 23rd day of August, 1919.

[Seal United States District Court, District of New Mexico, 1912.]

WYLY PARSONS,
Clerk.

Cost of Transcript, $13.10.

Endorsed on cover: File No. 27,278. New Mexico D. C. U. S. Term No. 523. O. O. Askren, Attorney General of the State of New Mexico, et al., appellants, vs. The Texas Company. Filed August 29th, 1919. File No. 27,278.

Office Supreme Court, U. S.
FILED
OCT 8 1919
JAMES D. MAHER,
CLERK.

No. 523.

In the Supreme Court of the United States

October Term, 1919

O. O. ASKREN, *as Attorney General of the State of New Mexico, et al., Appellants,*

vs.

THE TEXAS COMPANY, *Appellee.*

MOTION TO ADVANCE CAUSE ON DOCKET

A. B. RENEHAN, Santa Fe, New Mexico,
Attorney for Appellants.

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Supreme Court of The United States

October Term, 1919.

Nos. 521 522 and 523 Consolidated.

O. O. ASKREN, *etc., et al.,*
Appellants,

vs.

THE CONTINENTAL OIL COMPANY,
Appellee.

O. O. ASKREN, *etc., et al.,*
Appellants,

vs.

SINCLAIR REFINING COMPANY,
Appellee.

O. O. ASKREN, *etc., et al.,*
Appellants,

vs.

THE TEXAS COMPANY,
Appellee.

BRIEF AND ARGUMENT OF APPELLANTS.

STATEMENT.

1. This brief is prepared in anticipation of the consolidation of the three appeals as they involve identical legal propositions, differing only in the

number of stations kept by the respective appellee corporations.

2. The cases were heard by the United States District Court for the District of New Mexico upon the bills of complaint, the motion to dismiss for want of equity, which was denied, and the application for a temporary writ of injunction which was granted by the District Court. Pursuant to Sec. 266 of the Judicial Code the causes were referred to three judges concerning the application of the respective plaintiffs for an interlocutory injunction. By stipulation, upon this reference, hearing was had at St. Paul, Minnesota, on the 15th day of July, 1919, before Walter H. Sanborn, Senior Circuit Judge, John H. Cotteral, District Judge, and Wilbur F. Booth, District Judge, and by them on the same day an order granting a preliminary injunction, according to the prayer and application, was entered. These appeals were granted July 17, 1919, from the order of the special tribunal granting the preliminary or interlocutory injunction.

3. Apart from formal jurisdictional allegations, the substantial elements of the bills of complaint are:

(a) That an act of the Legislature of the State of New Mexico, approved March 17, 1919, entitled "An Act providing for an excise tax upon the sale or use of gasoline and for a license tax to be paid by distributors and retail dealers therein, providing for the inspection of gasoline, and making it unlawful to sell gasoline below a certain grade without notifying the purchaser; providing penalies for violation of this act, and for other pur-

poses," is unconstitutional and in violation of Sec. 8 of Article I of the Constitution of the United States, which vests in the Congress the exclusive power to regulate commerce between the states, and that said law also is in violation of Sec. 10 of Article 1 of the Constitution of the United States which prohibits any state, without the consent of the Congress, from laying any duties upon imports or exports, except such as are absolutely necessary for the execution of its inspection laws.

(b) That the plaintiff (in each case) is and at all times named has been engaged in business as a merchant and in buying and selling gasoline and other petroleum products; that in the usual and ordinary course of its business the plaintiff purchases gasoline in the states of Colorado, California, Oklahoma, Texas and Kansas, and from each and all of said states ships gasoline into the State of New Mexico, there to be sold and delivered to its customers in said state; that in the usual and ordinary method for the conduct of its business which has been adopted and had long been in use prior to the enactment of the statute aforesaid, and which is still in use, the plaintiff purchases in the states of Colorado, California, Oklahoma, Texas and Kansas, or in some one of said states, gasoline, and ships said gasoline in tankcars from the state in which purchased into the State of New Mexico, and there, according to its custom and the ordinary method in the conduct of its business, it sells in said tank car or tank cars the whole of the contents thereof to a single customer, and before the package or packages in

which the gasoline was shipped have been broken; that in the ordinary and regular course of its business it purchases gasoline in one of the states aforesaid other than the state of New Mexico, and ships the gasoline so purchased from that state in barrels and in packages containing not less than two five gallon cans into the State of New Mexico and there, in the usual and ordinary course of its business, without breaking said barrels or packages containing said cans, it is accustomed to sell and was accustomed to sell prior to the enactment of the law aforesaid the gasoline in said original barrels and packages, and according to said custom the said gasoline is sold and delivered to the customers of the plaintiff in precisely the same form and condition as when received in the State of New Mexico; that the gasoline purchased, shipped and sold as aforesaid in said tank cars, barrels and packages containing cans of gasoline is not purchased from a licensed distributor of gasoline in the State of New Mexico, and accordingly the plaintiff, in the shipping, selling and disposing of gasoline in the manner aforesaid, is a distributor of gasoline as the term distributor is defined by the aforesaid act of the Legislature of the State of New Mexico; that the plaintiff (The Continental Oil Company) has thirty-seven stations; (the plaintiff Sinclair Refining Company has three stations) (and the plaintiff The Texas Company, thirteen stations,) to which it ships gasoline from time to time in the regular course of its business in the manner hereinbefore described, and from which it sells gasoline in the manner above stated; that said act of

the Legislature requires the plaintiff to pay the sum of $50.00 per annum for each of its said stations as annual license tax for the privilege of shipping and selling gasoline in interstate commerce in the manner aforesaid; and said act declares it to be unlawful for any person to distribute or to sell gasoline after July 1, 1919, without having paid said license tax. * * * * That said act further exacts of the plaintiff that it shall pay for the privilege of shipping and selling gasoline in interstate commerce in the manner aforesaid what the act terms an excise tax of two cents for each gallon of gasoline so shipped and sold, * * * * shall render to the state auditor a monthly statement * * * * of all gasoline received and sold by the plaintiff during the preceding month, accompanied by a remittance of an amount of money equal in the aggregate to two cents for each gallon shipped and sold in the manner aforesaid; that * * * * any person who shall engage or continue in the business of selling gasoline in the State of New Mexico without paying said taxes for the privilege of doing so shall be deemed guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than $100.00 nor more than $1000.00, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment, and * * * any person failing to pay said tax shall be enjoined in an action brought in the name of the state from further distributing or selling gasoline in the State of New Mexico; * * * that to said tax shall be added as a penalty five per cent of the amount thereof and a monthly interest of one per

cent until it shall have been paid, and that it shall be the duty of the state treasurer to cause suit to be brought in the name of the state to collect such tax, penalty and interest.

(c) That said taxes constitute an unlawful burden upon interstate commerce, and the act of the Legislature aforesaid imposing such taxes for the privilege of engaging in interstate commerce as aforesaid is in conflict with those provisions of the Constitution of the United States hereinabove mentioned and is absolutely void.

(d) That said act of the Legislature *** provides for the appointment of inspectors, one for each of the eight judicial districts of the state, but said inspectors are not required by said act to inspect any gasoline sold or used in said state, and no inspection of gasoline sold *** is required to be made.

(e) That all gasoline sold, used or distributed in the State of New Mexico is imported into the state in interstate commerce, and no gasoline is produced in New Mexico.

(*f*) *That in addition to the sales of gasoline as aforesaid, the plaintiff ships gasoline as aforesaid from some or all of the states aforesaid in tanks, barrels or packages, and sells said gasoline so shipped from said tanks, barrels or packages in such quantities as the purchaser desires.*

(g) That upon and after the first day of July, 1919, unless prevented by writ of injunction, the defendants will seek to enforce the said unconstitutional act of the Legislature of New Mexico, and unless the plaintiff submits to the unlawful exactions and pays the said unlawful charges for

the purpose of continuing in business, defendants will enjoin the plaintiff from the conduct of its business and will cause the officers and agents of the plaintiff, at each and all of its various stations aforesaid, to be arrested, prosecuted and fined, etc.

4. The act of which complaint is made is Ch. 93, p. 182, Laws of 1919, as follows:

CHAPTER 93.

An Act providing for an Excise Tax upon the sale or use of Gasoline and for a License Tax to be paid by distributors and retail dealers tion of such taxes; providing for the inspection of such taxes; providing for th inspection of Gasoline and making it unlawful to sell gasoline below a certain grade without notifying purchaser thereof; providing penalties for violations of this act and for other purposes.

H. B. No. 298 (as amended); Approved March 17, 1919.

Be it enacted by the Legislature of the State of New Mexico:

Section 1. *Definitions.* As used in this act. The word gasoline means, (a) the volatile substance produced from petroleum, natural gas, oil shales or coal, heretofore sold under the name of "gasoline"; (b) any volatile product or substance of not less than 46 degrees Tagliaubes Baume test de-

rived wholly or in part from petroleum, natural gas, oil shales or coal; (c) any other volatile product or substance of not less than 46 degrees Tagliaubes Baume test, sold or used for producing motive power for internal combustion engines, or for producing power for propelling motor vehicles.

The word *person* means and includes all persons, corporations, firms, co-partnerships and associations.

The term *distributor of gasoline* means every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this State.

The term *retail dealer in gasoline* means a person, other than a distributor of gasoline, who sells gasoline in quantities of fifty gallons or less.

Sec. 2. *License Tax.* Every distributor of gasoline shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency.

Every retail dealer in gasoline shall pay an annual license tax of five dollars for each place of business or agency.

Such license tax shall be payable on or before the first day of June, 1919(for the half year ending December 31st, 1919) and thereafter on or before the first day of December for each succeeding calendar year.

It shall be the duty of every person intending to deal in gasoline to make application to the Secretary of State for such license certificates, stating whether he intends to engage in such business as a distributor or retail dealer and at the time of submitting such application to pay the license tax as herein provided. License certificates for persons commencing business after July 1st in any year may be issued for a half year upon payment of half the annual license tax herein provided.

It shall be unlawful for any person to distribute or sell gasoline after July 1st, 1919, without having paid the said license tax and without having at all times conspicuously displayed at his place of business or agency a license certificate evidencing the payment of such license tax for the then current year or fraction thereof.

Every application for license shall be accompanied by remittance to the Secretary of State of the amount of such license fee. The net proceeds of all license fees received by the Secretary of State in any month derived from the license herein provided shall be deposited with the State Treasurer on or before the tenth day of the following month, to be credited to the State Road Fund.

Sec. 3. There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this State after July 1st, 1919, which tax shall be paid as hereinafter

provided at the rate of two cents per gallon upon all gasoline so sold or used.

On or before the tenth day of each calendar month, commencing with the month of August, 1919, every distributor of gasoline shall render to the State Auditor a true statement in such form as shall be prescribed by the Auditor, of all gasoline received and sold, distributed or used by such gasoline distributor during the preceding month, accompanied by remittance of an amount of money equal to a total of two cents per gallon for all gasoline sold, distributed or used during the month, which amount shall be paid over to the State Treasurer. Such statement shall also show from whom the gasoline so received was purchased or shipped. A duplicate of such statement shall also be forwarded by such distributor at the same time to the district inspector for the district in which such gasoline distribution, place of business or agency is located.

Sec. 4. On or before the tenth day of calendar month every retail dealer in gasoline shall render to the State Auditor a true statement, in form prescribed by the Auditor, of all gasoline received, sold and used by such dealers during the preceding month, which statement shall show from whom such gasoline was purchased; a copy of such statement shall also be forwarded by such dealer to the district inspector for the district in which such dealer's place of

business is located. If any of the gasoline sold or used by any such dealer was purchased from any other person than a licensed distributor in this State, said dealer shall at the time of making the return accompany the same by a remittance of an amount of money equal to a total of two cents per gallon upon such gasoline sold or used to be paid over to the State Treasurer.

Any such distributor or dealer who shall fail to make such return or statement, or who shall make any false return or statement, or refuse, neglect or fail to pay the tax upon all sales or use of gasoline, as herein provided, or who shall knowingly sell, distribute or use any gasoline without the tax upon the sale or use thereof having been paid or provided for as herein required shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each offense and in addition to such punishment shall forfeit the license and right to carry on such business and shall not again be permitted to engage in such business in this State until after one year from the date of such conviction.

Any distributor or dealer who shall fail or refuse to make such return, or fail to pay the taxes herein provided for, or who shall make any false return hereunder, shall be enjoined in an action brought in the name of the State from further distributing or

selling gasoline in this State until he shall have complied with the provisions of this Act or until after one year from the date of conviction for any violation thereof.

If any tax imposed under the provisions of this act shall not be paid when due there shall be added thereto a penalty of five per cent of the amount thereof and the said tax and penalty shall bear interest at the rate of one per cent per month until paid. It shall be the duty of the State Treasurer to cause suit to be brought in the name of the State to collect such delinquent tax and penalty and interest and it shall be the duty of the Attorney General or any district attorney to commence and prosecute such suit at the request of said Treasurer.

Sec. 5. It shall be unlawful for any person (except tourists or travellers to the extent hereinafter provided) to use any gasoline not purchased from a licensed distributor of gasoline or retail dealer in gasoline in this State without paying the tax at the rate of two cents per gallon upon the use thereof.

Every person who shall use any gasoline not purchased from a licensed distributor of gasoline or licensed retail dealer in gasoline in this State, shall, on or before the tenth day of each calendar month render to the State Auditor a true statement of all gasoline so purchased and used during the preceeding month and shall at the time of making such return accompany the same

with remittance of an amount of money equal to a total of two cents per gallon upon all gasoline so used, which amount shall be paid over to the State Treasurer.

It shall be unlawful for any person to knowingly use any gasoline without the said excise tax upon the sale or use thereof having been paid or provided for according to this Act; provided, that any tourist or traveller coming into the State in a motor vehicle may bring into the State in such vehicle and for his own use only not more than twenty gallons of gasoline at one time and use the same without payment of tax thereon.

Sec. 6. Inspectors: Duties: The Governor shall appoint one inspector for each of the eight judicial districts of the State, and such inspectors shall hold their offices during the pleasure of the Governor.

Such inspectors shall see to the enforcement of the provisions of this Act, and shall be authorized to examine the books and accounts of all distributors of gasoline or retail dealers in gasoline or warehousemen or others receiving or storing gasoline and of railroad or transportation companies, relating to purchases, receipts, shipments or sales of gasoline.

Each inspector shall receive a salary of one hundred and fifty dollars per month, which shall include necessary traveling expenses actually incurred while performing the duties of his office.

Such salary and expense bills shall be paid and vouchered in the same manner as the salaries and expenses of other state employes, and shall be paid out of the State Road Fund.

Every such inspector shall take and subscribe the oath of office prescribed by the Constitution, and shall furnish and file with the Secretary of State a surety company bond in the sum of two thousand dollars in form to be approved by the Attorney General.

Sec. 7. It shall be unlawful for any public garage owner, operator or any distributor of gasoline or retail dealer in gasoline, or any other person, to sell gasoline of a lower grade than 46 per cent or degrees Tagliaube's Baume test, or gasoline adulterated with water, kerosene, or other substance, without first notifying the purchaser by a statement stamped or stenciled on the package or delivered to the purchaser, stating the true grade of such gasoline or the fact of such adulteration.

Sec. 8. Any person who shall engage or continue in the business of selling gasoline without a license or after such license has been forfeited as provided in this Act, or who shall fail to render any statement required by this Act, or make any false statement therein, or who shall violate any other provision of this Act, the punishment for which has not been hereinbefore provided, shall be deemed guilty of a misdemeanor

and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment.

Sec. 9. The State Treasurer shall set aside from the license fees and the taxes collected under the provisions of this Act a sufficient sum each year to pay the salaries and traveling expenses of the inspectors as herein provided, which salaries and expenses shall be paid in the manner provided by law for payment of salaries and expenses of other State officers and employes; the balance of the moneys so received from such collections shall be placed to the credit of the State Road Fund to be used for construction, improvement and maintenance of public highways.

Sec. 10. That it is necessary for the preservation of the public peace and safety of the inhabitants of the State of New Mexico that the provisions of this Act shall become effective at the earliest possible, time, and therefore an emergency is hereby declared to exist and this Act shall take effect and be in full force and effect from and after its passage and approval.

5. No written opinion was rendered either by the District Court or the special tribunal, but the injunctive order in its essence is: "That the defendants and each of them be enjoined until the final decree in this court, or the further order of

this court, from taking any action, looking to the enforcement as against the plaintiff in this cause of that act of the Legislature of New Mexico, approved March 17, 1919, entitled 'An Act Provided for an Excise Tax,' etc."

6. In each case error was assigned as follows:

ASSIGNMENTS OF ERROR.

1. That it appears by the bill of complaint that the annual tax of $50 per year required to be collected from the plaintiff, by the Act of the Legislature of the State of New Mexico of which complaint is made, is an internal or occupation tax assessed against all persons in the same category or classification as the plaintiff, and that it is not a burden on Interstate Commerce, within the meaning of the Federal Constitution, and the said Special Tribunal erred in holding to the contrary.

2. That the tax of 2c per gallon on gasoline is proposed to be levied on sales of gasoline as made, after the commodity has come to rest and reached its destination in New Mexico, and become commingled with the common property of the State of New Mexico, and not while it is in transit, or while it is in interstate commerce, and the said court erred in holding to the contrary.

3. That neither the said annual tax of $50 per year *or* the gallon excise or charge of 2c is a tax or charge for the privilege of doing interstate business, but is and will be presumed to be directed only to intra-

state commerce, and the said court erred in holding to the contrary.

4. That the taxes mentioned are of a three-fold character: first, for inspection *pro tanto* the cost thereof as fixed and limited by the act itself, within bounds which on their face are reasonable; second, for occupation in a peculiarly hazardous form of enterprise or business; and, third, for excise or charge upon sale, use or consumption of gasoline, and are lawful and within the permission of the Federal Constitution, and not in any of said respects an imposition upon interstate commerce, in the constitutional sense, but being under the reserve police power of the state in regard to the inspection feature of the law, which is but one of several purposes, and otherwise are matter of domestic and not federal concern, and the said court erred in holding to the contrary.

5. That the court erred in holding that the said taxes are not at least in legitimate part for inspection, and that they constitute a charge for the privilege of doing an interstate business or engaging in interstate commerce.

6. That upon the face of the bill the plaintiff in its business is a localized merchant and subject to the taxes sought to be gathered under the said Act of the New Mexico legislature.

7. There is really, in point of law, but one question for argument, whether the law attacked

is an unconstitutional interference with or burden upon interstate commerce, involving the subjacent problem relative to the nature of the several plaintiffs' business, and whether the commodities affected had come to rest in the State of New Mexico. The several propositions asserted in the assignments of error will therefore be treated as but one substantial proposition containing three elements or points of view of the New Mexico legislative act; first, *pro tanto*, the inspection fee or charge; second, the occupation tax; third, the excise tax.

BRIEF AND ARGUMENT.

I

THE ACT OF THE LEGISLATURE IN CONTROVERSY IMPOSES NO UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE, BUT THE APPELLEES ARE MERELY LOCAL MERCHANTS, POSING AS INTERSTATE TRADERS, AND THEIR PARTICULAR COMMODITIES HAD COME TO REST.

This postulate finds support in the bill which will be taken most strongly against the pleader, who has indulged in much statement, by way of conclusion, that its shipments and its business are interstate. These conclusions will be treated as valueless as allegations, but substantial averments where they are found will be looked to as a test of the appellees' true relation to the act under study.

In the third paragraph of the bill (R. p. 5) it is declared that "The plaintiff ships gasoline as aforesaid from some or all of the states aforesaid,

in tanks, barrels or packages, and sells said gasoline so shipped from said tanks, barrels and packages, in such quantities as the purchaser desires." It thus appears that at least a part of its business, in respect to its different kinds of containers, is to supply gasoline to anybody who asks for it and in any quantity, whether small or great, out of the containers in which the gasoline arrived. Thus it is shown that the tanks, barrels and packages are brought into New Mexico, with the intention, according to the business custom and habit of the plaintiffs, that therefrom any part of the commodity desired will, when desired, be abstracted from the receptacles sold and delivered. This clearly establishes the status of a local merchant, and manifests that the gasoline when it came into New Mexico was at rest there and commingled with the general property of the State. But with an unclean spirit, not to say unclean hands, the plaintiffs would claim or make pretense to protection against the enforcement of a law in respect to them which affects all other dealers in or handlers of the same commodity localized in the State, on the theory that they may take either position, as suits their convenience or their purse, as interstate tradesmen or local tradesmen. In a word, they say that until they have dipped or run some gasoline out of its particular container, the goods remain interstate commerce, even though they carry it as a stock in trade like any other merchant. It is true they aver that the manner of doing business just described is in addition to a pretendedly different

manner of doing business in the same commodities declared elsewhere in the bill (R. p. 3.)
But nowhere in their pleadings have they drawn the line of demarcation between that form of business which is shown to be local and that form of business which they claim is still interstate even after the arrival and detention of the wares and merchandise in New Mexico, but assume contrary to law and presumption of law that the State officers will burden interstate commerce in reaching after domestic commerce. They cannot or will not draw an intelligible distinction between the parcels of the property which they pretend remain interstate commerce and those which have become domestic.

The other method of carrying on its business is described in the third paragraph of the bill, to-wit: It buys gasoline away from New Mexico and brings it into that State in tank cars and sells the entire contents of the tank car to a single customer, drawing them off apparently, and in like manner brings in barrels and packages containing two 5-gallon cans, and sells the barrel or the package, in the same condition as it arrived, to its customers, but it keeps stations, each of the complainants keeps stations to which the gasoline is consigned, "in the manner hereinabove described," and from which it sells gasoline "in the manner above stated. Construing the two statements of the manner of doing business found in the third paragraph of the bill there can be no doubt that each station is in a sense an individual merchant who will sell from his stock in trade a tank or a barrel or a package, or therefrom "such quanti-

ties as the purchaser desires." There is no averment or suggestion that any sale is made before the gasoline is brought to one of the stations from outside New Mexico. The appellees or complainants are therefore in the case of a New Mexico wholesale grocer who brings in sugar, which is not produced in New Mexico, in barrels or boxes or packages, and will sell a customer a barrel or a box or a package unbroken or any part thereof. If these oil companies may introduce their peculiar goods and wares and hold them in stock, in the original containers, ready for such purchases as the chance customer may wish to make and thereby escape taxation, so likewise may the wholesale grocer escape taxation upon the sugar in its original containers until his customer comes to buy and the package is broken, but this is not the law now if it ever was the law. The so-called original package is not a wizard which throws over the dealer the Constitution of the United States as a guard against local or domestic taxation, irrespective of the nature of the dealer's business, his manner of conducting it, and his intention with regard to his merchandise, for intention, as disclosed by act and habit, generally determines whether or not the property has been commingled with the resources of the State, or whether it remains interstate. Subterfuge, for the evasion of local duties, responsibilities and burdens, in the face of such bills as we are concerned with here, is readily detected, and the nature of the creature under the sheet is not absolutely obscured. The complainants by their bills have said: "We have at our many stations in

New Mexico, gasoline in large quantities, in all kinds of containers to meet every need; we will sell you in any quantity desired, from a pint to a tank car and deliver it right there at the station, which exists for such varied accommodation." Possibly the court would take judicial notice of a method of all of these oil companies, following a custom, to send around their tank wagons, peddling and distributing gasoline and kerosene in any desired quantity. What everybody knows, courts may know.

II

SEC. 10, ART. I, U. S. CONST., RELATING TO IMPOSTS OR DUTIES ON IMPORTS OR EXPORTS, WITHOUT CONGRESSIONAL CONSENT, HAS NO APPLICATION HERE.

The offending law is alleged to be in conflict with and opposed by the third paragraph of Sec. 8, Art. I, U. S. Const., giving power to the Congress "To regulate commerce with foreign nations and among the several states, and with the Indian tribes," and Sec. 10 of the same Art. that "No state shall, without the consent of Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state upon imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

Under this head only the latter provision shall be dealt with, and the general commerce clause

of the Constitution will be reserved for another caption.

According to the complaint the gasoline in question constitutes the imports or importations from several other states into the State of New Mexico. It can have no other nature. But that question has been long since judicially foreclosed by this court. The term "imports" does not refer to articles imported from one state into another.

Woodruff vs. Parham, 8 Wall., 123.

Hinson vs. Lott, 8 Wall., 148.

Brown vs. Houston, 114 U. S. 622; 29 L. ed. 257.

Territory vs. Denver & R. G. R. Co., 203 U. S., 38; 51 L. ed., 78.

American Steel & Wire Co. vs. Speed, 192 U. S., 500; 48 L. ed., 538.

11 U. S. Comp. Stat. Ann., p. 13848, Sec. 5.

III

THE THIRD PARAGRAPH OF SEC. 8, ART. I, U. S. CONST., WITH REFERENCE TO COMMERCE AMONG THE SEVERAL STATES DOES NOT CONTROL UNDER THE FACTS IN THIS CASE BECAUSE THE PROPERTY AFFECTED WILL HAVE REACHED ITS DESTINATION, WHEN AFFECTED, EVEN THOUGH SOLD IN ORIGINAL PACKAGES.

Attention has been called to Sec. 3 of the bill describing what might be called the appellees' two methods of handling or selling its gasoline, which indicate an ordinary mercantile condition

of waiting for customers at wholesale or retail, without negotiating sales before importation, and without sale or contract to sell made before the introduction of the commodity into New Mexico.

Mobile, Alabama, sought to collect a tax for municipal purposes on sales at auction and sales of merchandise, capital employed in business and income within the city. Woodruff and others, auctioneers, received in the course of their business *for themselves,* or as consignees and agents for others, large amounts of goods and merchandise, the products of states other than Alabama, and sold the same in Mobile, *to purchasers in the original and unbroken packages.* The tax was demanded and Woodruff refused to pay it, because repugnant to the following clauses of the national Constitution, to-wit:

> "Congress shall have power to regulate commerce with foreign nations and among the several states."
>
> "No state shall levy any imposts or duties on imports or exports."
>
> "The citizens of each state shall be entitled to all the immunities and privileges of citizens of the several states."

Reliance was finally placed only on the first two constitutional provisions mentioned. Brown v. Maryland, 12 Wheaton, 449, was invoked to sustain the defendant's contention because of language therein that,

> "It may be proper to add, that we suppose the principles laid down in this case, apply equally to importations from a sister state,"

although the matters there dealt with were true imports. But the ineptitude of this supposition is recognized in the License Cases in the opinion of Mr. Justice McLean, 5 Howard, 594, where, concerning it, he says:

> "This remark of the court was incidental to the question before it and the point was not necessarily involved in the decision. Whilst the remark cannot fail to be considered with the greatest respect, coming as it did from a most learned and eminent chief justice, yet it cannot be received as authority. It must have been made with less consideration than the other points ruled in that important case."

In Woodruff v. Parham, 8 Wall., 132, upon the facts just related this court held that:

> "A uniform tax imposed by the state upon all sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of that state enacting the law or of some other state, is valid."

In the text it argues:

> "Whether we look, then, to the terms of the clause of the constitution in question, or to its relation to the other parts of that instrument * * * we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one state to tax articles brought into it from another. * * * The merchant of Chicago who buys his goods in New York and sells it wholesale in the original packages, may have his

millions employed in trade for half a lifetime and escape all state, county and city taxes. * * * Neither the state nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. * * * It is obvious that if articles brought from one state into another are exempt from taxation, even under the limited circumstances laid down in the case of Brown vs. Maryland, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible. * * * The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or another state, and whether the goods sold are the produce of that state or some other. There is no intent to discriminate adversely against the products of other states or the rights of other citizens, and the case is not, therefore, an attempt to fetter commerce among the states."

In Hinson v.| Lott, 8 Wall., 148, the same questions were involved and the same two clauses of the national Constitution were relied on. The principles of the Woodruff case were affirmed, although the mode of collecting the tax on an article made in the state was different from the mode of collecting the tax on the article brought from another state. Such being the effect of the act it was held to institute no legislation which discriminated against the products of sister

states, but merely to subject them to the same rate of taxation as similar articles that were manufactured within the state, and that, accordingly, it was not an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing powers of the States.

There was under consideration, in the Hinson case, a statute of Alabama, which declared that,

> "Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this state, such dealer or dealers introducing any such liquors into the state for sale shall first pay the tax collector of the county into which such liquors are introduced, a tax of fifty cents per gallon upon each and every gallon thereof."

Other sections of the statute levied a tax of fifty cents per gallon on all whiskey and all brandy from fruits manufactured in the state, and in order to collect this tax enacted that every distiller should take out a license and make regular returns of the amount of distilled spirits manufactured by him. On these he was to pay the fifty cents per gallon. The statute there was very much like our own, which can as conveniently be condensed here as elsewhere, for comparison, with reference to the tax or charge, as follows: Every distributor of gasoline shall pay an annual license tax of $50.00 for each distributing station; every retail dealer in gasoline shall pay an annual license tax of $5.00 for each place of business; every person intending to deal in gasoline shall make application to the Secretary of State for

license certificates, stating whether he intends to engage in such business as a distributor or retail dealer, and at the time of submitting such application shall pay the license tax provided for; it shall be unlawful for any person to distribute or sell gasoline, after July 1, 1919, without having paid the said license tax; there is imposed an excise tax upon the sale or use of all gasoline sold or used in this state after July 1, 1919, at the rate of two cents per gallon upon all gasoline so sold or used, and on or before the tenth day of each calendar month, every distributor of gasoline shall render to the State Auditor a true statement of all gasoline received and sold, distributed or used by such distributor during the preceding month, accompanied by the remittance of an amount of money equal to a total of two cents per gallon for all gasoline used, distributed or sold during the month; such statement shall also show from whom the gasoline so received was purchased or shipped; on or before the tenth day of each calendar month every retail dealer in gasoline shall render to the State Auditor a true statement in form prescribed by the auditor of all gasoline received, sold and used by such dealer during the preceding month, showing from whom such gasoline was purchased; if any of the gasoline sold or used by any such dealer was purchased from any other person than a licensed distributor in this State such dealer shall at the time of making the return accompany the same by the remittance of an amount of money equal to a total of two cents per gallon upon such gasoline used or sold; a copy of such statement shall also be

forwarded by the dealer to the district inspector for the district in which such dealer's place of business is located; it shall be unlawful for any person, except tourists or travelers, to use any gasoline not purchased from a licensed distributor of gasoline, or retail dealer of gasoline in this state, without paying the tax at the rate of two cents per gallon upon the use thereof; it shall be unlawful for any public garage owner, operator, distributor of gasoline or retail dealer in gasoline, or any other person to sell gasoline of a lower grade than forty-six per cent or degrees, Tagliaube's Baume test, or gasoline adulterated with water, kerosene or other substance, without first notifying the purchaser, etc.; the governor shall appoint inspectors who shall see to the enforcement of the provisions of this act, and shall be authorized to examine the books and accounts of all distributors of gasoline or retail dealers in gasoline, warehousemen or others receiving or storing gasoline, etc.

Hinson, a Mobile merchant, filed a bill against the tax collector, setting forth that he had on hand five barrels of whiskey consigned to him by one Dexter, of the State of Ohio, to be sold on account of the latter in the State of Alabama, and that he had five other barrels purchased by himself in the State of Louisiana, and that he had brandy and wine imported from abroad, upon which he had paid the import duties laid by the United States, all of which liquors he held and was offering for sale in the same package in which they were imported, and not otherwise. The Alabama Supreme Court granted the relief prayed as to

all but the state tax, and as to that granted the relief in respect to goods imported from abroad, but the state tax of fifty cents per gallon on the whiskey of Dexter of Ohio, and that purchased by the plaintiff in Louisiana, was held to be valid.

Mr. Justice Miller writing the opinion in the Hinson case said, in part:

> "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other states in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned (concerning commerce between the states.) But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same act of fifty cents per gallon on all whiskey and all brandy from fruits manufactured in the state. In order to collect this tax every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. No greater tax is laid on liquors brought into the state than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured with-

> in the state, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the state. * * * The act institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state. We do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states."

Georgia had a law imposing upon all agents of packing houses doing business in that State a tax of $200.00 in each county where the business was carried on. One Kehrer attacked the law as in violation of the 14th Amendment concerning privileges and immunities and equal protection. The statute was held valid. The facts were that Nelson Morris & Co., citizens of Illinois, were engaged in the City of Chicago in the business of packing meats for sale and consumption, and also had a place of business at Atlanta, where they sold their products at wholesale, having in their employ several clerks and helpers. The firm had no packing house in Georgia, but took orders which were filled at Chicago, and the meats sent to Atlanta and there distributed in pursuance of such orders. Certain meats were also shipped to Atlanta without a previous sale or contract to sell. These were stored in the Atlanta house in the original packages, and were kept and held for sale in the ordinary course of trade as domestic

business. They were offered for sale to such customers as might require them, and until sold were stored and preserved and remained the property of the firm. The State Supreme Court decided that the tax on meats sold in Chicago and shipped to Georgia for distribution could not be supported, "but that so far as the petitioner, (Kehrer, manager for the Morris firm) was engaged in the business of selling directly to customers in Atlanta, he was engaged in carrying on an independent business as a wholesale dealer, and was liable to the tax."

Kehrer v. Stewart, 197 U. S., 60; 49 L. ed., 666.

This Court said in that case.

> "This decision was correct. In carrying on the domestic business, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon arrival there they became a part of the taxable property of the State. It made no difference whence they came or to whom they were ultimately sold, or whether the domestic and the interstate business were carried on in the same or different buildings."

This is to all intents and purposes our case, except that our inquiry is not concerned with orders taken, filled and delivered interstate. All of the appellees' gasoline was sent into New Mex-

ico to be sold in ordinary domestic trade as customers appeared. These goods *were sent to New Mexico for sale and consumption in the ordinary course of trade. Upon their arrival they became a part of the taxable property of the State.*

The tax imposed by the New Mexico law operates only when sales are made, outside of the licenses to do business, that is, the excise tax, in which respect it is like the whiskey tax in the Hinson case and the sales tax in the Woodruff case.

Brown v. Houston, 114 U. S., 622, affirms the Woodruff case in relation to the imports and exports controlled by Sec. 10, Art. I, U. S. Const., and apart from that question the facts were these: The plaintiffs were residents and did business in Pittsburg, Pennsylvania, and sought to enjoin the defendant, Houston, from seizing and selling a lot of coal belonging to the plaintiffs, situated in New Orleans, Louisiana, for the collection of a state tax for the year 1880 upon a lot of Pittsburg coal, assessed as their property, as to which they were said to be delinquent. They alleged that they were not indebted to the State of Louisiana for the said taxes; that they were the sole owners of the coal; that they were not liable for any taxes thereon, having paid all taxes legally due for the year 1880 for said coal in Pennsylvania; that the coal was simply under the care of Brown & Jones as their agents in New Orleans for sale; that the coal was mined in Pennsylvania, exported therefrom into Louisiana as their property, and was then, and had always remained, in its original condition; that when the assessment was made the coal was afloat in the Mississippi

river in the original condition in which it was exported from Pennsylvania; that the assessment of the tax and any attempt to collect it were illegal and contrary to the Constitution of the United States, Art. I, Sec. 8, paragraphs one and three, and Sec. 10, paragraph two; that at the time the assessment was made the coal had just arrived from Pittsburg by flat boats, and was on said boats in which it arrived and afloat in the river; that it was held by Brown & Jones to be sold for account of the plaintiffs by the boat load, and since then more than half of it had been exported from this country on foreign steamships, and the balance sold into the interior of the State for plantation use, by the flat boat load; that it was received in New Orleans in its original condition and in its original packages and still owned by the plaintiffs.

Mr. Justice Bradley, rendering the opinion in the case last cited, said:

> "The plaintiffs were not exporters; they did not hold the coal at New Orleans for exportation *but for sale there.* Being in New Orleans, and held there on sale, without reference to the destination or use which the purchasers might wish to make of it, it was taxed in the hands of the owners, or their agents, like all other property in the city, six mills on the dollar. * * * * When taxed it was not held with the intent or for the purpose of exportation, but with the intent and *for the purpose of sale there, in New Orleans.* * * * * But, certainly, where a general tax is laid upon all

property alike, it cannot be construed as a duty on exports, nor falling upon goods not then intended for exportation without they should happen to be exported afterwards."

Continuing, he said: (p. 632)

"The question then arises whether the assessment of the tax in question amounted to any interference with, or restriction upon the free introduction of the plaintiff's coal frrom the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter State; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the States; or only to the exercise of local administration under the general taxing power, which, though it may incidentally affect the subject of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject. * * * * It was not a tax imposed upon the coal as a foreign product, or as product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed while it was in a state of transit from that State to some other place of destination. *It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans.* It might con-

tinue in that condition for a year or two years, or only for a day. *It had become a part of the general mass of property in the state.* * * * * It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated. * * * (p. 633). It cannot be seriously contended * * * that all goods which are the product of other states are to be free from taxation in the state to which they may be carried for use or sale. * * * When the assessor of taxes goes his round, must he omit from his list all taxables or goods which have come into the state from the factories of New England or New Jersey or from the pastures or grain-fields of the West? If he must, what will be left for taxation? *How is he to distinguish between those goods which are taxable and those which are not?* With the exception of goods which are imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, *being there for the purpose of remaining there till used or sold, and constituting a part of the great mass of its commercial capital*—provided always that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of

> other states. * * * * And if, after their arrival within the state, —*that being their place of destination for use or trade,* —if, after this, they are subjected to a general tax paid alike upon all property within the state, we fail to see how such a tax may be deemed a regulation of commerce, which would have the objectional effect referred to."

Our law did not impose a general property tax, it is true, but the reasoning and the analogy are none the less positive and affirmative, and the decision just quoted from is completely effective to sustain the appellants' defenses, under theories which are to be presented later, to-wit: classification and equality of effect upon all property within the class; the presumption that the law shall concern only intrastate commerce; and the rule that, even though a manufacture or property upon which a tax is laid, is not produced within the taxing state, no theory of discrimination is involved, on that account.

A most conclusive decision by this Court is found in American Steel & Wire Co. v. Speed, 192 U. S., 500; 48 L. ed., 538, and covers both the tax on sales and the license tax upon the business. The syllabi are so concise that in the first instance they will be set forth as presenting both facts and law.

> 1. A State is not precluded by the commerce clause of the Federal Constitution from imposing a merchant's tax upon a non-resident manufacturing corporation which has selected a city of that state as a

distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assort them, and store them in a warehouse, and make delivery in the *original packages* to the customers of the manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company,—since, under such circumstances, *the goods, when stored in the warehouse, were no longer in transit, but had reached their destination, and were held in the state for sale.*

2. Goods brought into one state from another are not imported within the meaning of U. S. Const. Art. I, Sec. 10, paragraph 3, forbidding state taxation of imports, and are, therefore, *though still in the original packages, subject to state taxation after they have reached their destination and are held in the state for sale.*

3. The mere determination as to who are merchants within a state tax law involves no Federal question which can be reviewed on writ of error to a state court, where the levy of the merchants' tax violates no Federal right.

There was under consideration a Tennessee statute providing for a general ad valorem tax on all property; for a merchants' tax separate from the ad valorem levy, this latter being of two classes: a tax upon the average capital invested

in the business, and a privilege tax, which was at a different rate, and in other respects distinct from the merchants' tax. The statute defined the word "merchants" and provided that all persons engaged in the manufacture should pay an ad valorem tax upon the actual cash value of their property, except the value of articles manufactured from the produce of the state in the hands of the manufacturer should be deducted, and some other immaterial exceptions.

Both a general merchants' tax and a merchants' privilege tax were assessed against the American Steel & Wire Company. The company was a New Jersey corporation, having a place of business in Chicago, and owning and operating various plants for the manufacture of wire, nails, etc., in states other than the State of Tennessee. And, for the purpose of facilitating sale and delivery of the goods by it manufactured, it had selected Memphis, Tennessee, as a distributing point, and had made an arrangement in that city with the Patterson Transfer Company, a corporation, engaged in Memphis in the transfer of merchandise. By this arrangement the transfer company was to take charge of the products which were shipped to Memphis, consigned to the Steel Company, store them in the warehouse there, assort them and make delivery to the persons to whom the goods were sold by the Steel Company. It was held that the transfer company, in fulfilling its obligation under the contract, was in no sense a merchant but only a carrier, and that the Steel Company in storing and delivering these goods at Memphis was not a merchant in Mem-

phis, but was simply a manufacturer *delivering in the original packages goods made in other states to the persons who had bought them.* In substance, besides, it was alleged that the goods in the warehouse in Memphis were merely in transit from the point of manufacture outside of the State of Tennessee, to the persons to whom they had been previously sold. The levy of the tax was charged to be repugnant to the commerce clause of the Constitution of the United States: First, because the goods in the warehouse in Memphis *were in the original packages* as shipped from other states and had not been sold in Tennessee, and hence had not been commingled with the property of that state, and, because, in any event, they had acquired no situs in Tennessee, as they were moving in the channels of interstate commerce from the place where the goods were manufactured, for delivery to the persons to whom in effect they had been sold; second, because as the State of Tennessee exempted from taxation articles manufactured from the produce of that state, no tax could be imposed by Tennessee upon articles manufactured from the produce of other states, without operating a discrimination against articles manufactured from the produce of other states. * * * As a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvassed the southwestern country to make contracts exclusively with jobbers. * * * * The grade and quality are left open, to be subsequently specified when the customer desires delivery. The customer can, when he makes his specification, select any

grade of goods he desires, and, upon so selecting, they will be delivered to him, up to the quantity contracted for, within a time agreed upon, at prices contracted for, applicable to the several grades. * * * * The contracts are made usually before the goods arrive at Memphis, their appointed destination, and generally the contracts are made in advance of the production of the goods at the factory. * * * * The customer forwards his specification to the office in Chicago, and then the goods, under an order from the Chicago office, addressed to the Patterson Transfer Company at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouse in Memphis, and are shipped by the transfer company to the customer. * * * * About ninety per cent of the mass of the goods kept on hand in Memphis ultimately goes to jobbers beyond the limits of the state, and the remaining ten per cent goes to the Memphis jobbers in fulfillment of the general contracts previously referred to. * * * * No one but an agreed or recognized customer of the complainant can make out a specification or have goods delivered from the warehouse of the transfer company. * * * * Sometimes the complainant's stock in hand is as low in value as $30,000, and sometimes as great as $100,000. * * * As a general rule, while the plaintiff endeavors to secure contracts covering its output before the goods are manufactured, yet it does not always do so; but taking advantage of the seasons when there is a good stage of water in the river, which must be used in floating its products from its mills to

Memphis, *it masses its goods at the latter point in anticipation of future sales.* * * * * The complainant's goods are put up in original packages.

The court say:

> "With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store, at the risk of the Steel Company, to be sold and delivered as contracts for that purpose were completely consumated. All question, therefore, as to the power of the state to levy a merchants' tax based on a contrary contention, being without merit, may be put out of view. The other propositions pressed upon our attention require consideration. They relate to two subjects: first, the asserted want of power of the State of Tennessee to tax because the goods were imported from another state, and were yet, it is contended, *in the original packages;* and, second, because of the alleged discrimination asserted to result from a provision of the State Constitution exempting goods manufactured from the produce of the state."

In brief, it was ruled as follows: That the goods not having come from abroad were not imported in a legal sense, and were subject to state taxation after they had reached their destination and whilst held in the state for sale; that the several states, therefore, not being controlled as to such merchandise by the prohibition against the taxa-

tion of imports, had the power, after the goods had reached their destination, *and were held for sale,* to tax them, without discrimination, like other property situated within the state; that Leisy vs. Hardin, 135 U. S., 100, 34 L. ed., 128, and Lyng v. Michigan, 135 U. S., 161, 34 L. ed., 150, are not opposed to this conclusion; that Woodruff v. Parham, and Brown v. Houston, *supra,* have not been overruled or even qualified; that as, however, the goods had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded and were taxed without discrimination, like all other property, the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce.

Oil shipped from Pennsylvania and Ohio and destined ultimately for points in Arkansas, Louisiana and Mississippi, is not property in interstate commerce, so as to be exempt from state tax or inspection laws while it is held at a distributing point maintained by the shipper in Tennessee, at which point such oil is unloaded from tank cars into various tanks, barrels and other receptacles, and from which it is forwarded to its final destination.

General Oil Co. v. Crain, 209 U. S., 211; 52 L. ed., 754.

In that case the commerce clause of the Constitution was interposed as a defense. While the product came from the producing state in tank cars, it was claimed to be necessary to unload it into smaller receptacles or containers, but not for

sale in Tennessee, and while still in transit to other states than Tennessee. It was charged that an inspection was not necessary, the fees unreasonable, and the act not a valid exercise of the police power, but that the tax or charge was imposed under the guise of a police regulation. It was alleged that the act, prescribing fines for obstruction to the inspector, or refusal to permit him to visit the necessary premises for the performance of his duties, and making it a misdemeanor to sell oil before it was inspected was invalid on these grounds. After reviewing a number of cases tending to show when transit begins and ends, this court said:

> "The substance of these cases is that while the property is at rest for an indefinite time, awaiting transportation, or awaiting sale at its place of destination, or at an intermediate point, it is subject to taxation. But, if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local taxation."

Proceeding further it is said:

> "The company was doing business in the state, and its property was receiving the protection of the state. This oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation * * * but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill

orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there, —the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this. * * * This certainly describes a business—describes the purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary, —a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in American Steel & Wire Co. v. Speed. * * * * The cases based on the taxing power show the contentions of the plaintiff in error to be without merit; in other words, show that this oil was not property in interstate commerce."

It will thus be seen that the unloading from one container to others was not a determinative factor, since it has been held that some kinds of interruptions of transit do not take away the character of interstate commerce.

Western Oil Refining Co. v. Lipscomb, 244 U. S., 346; 61 L. ed., 1181, is a still later judgment supporting the appellants' theories. There a foreign corporation shipped into the state a tank car and a carload of steel barrels containing just the quantity of oil and the number of barrels necessary to fill orders from two towns in the state, which had been taken by a traveling salesman, billing the cars to one town at which the orders

from there were to be and were filled, and rebilling such car to the other town where the orders from that place could be and were filled—held: that it could not be subjected to a privilege tax without violating the commerce clause of the Federal Constitution, the intrastate transportation being both in fact and in law a connected part of the continuous interstate movement. Factors controlling the decision were the continuous interstate movement of the product and the fact that "the plaintiff had no office or local agent in Tennessee, nor any oil depot, storage tank or warehouse in that state." But the gasoline with which we are dealing is not in continuous interstate movement, and besides the appellees have stations, depots, warehouses and selling agents in New Mexico. Furthermore it is said:

> "Unlike Gulf C. & S. F. R. Co. v. Texas, 204, U. S. 403; 51 L. ed., 540, this is not a case where, at the time of the original billing *the shipper had no purpose to continue the transportation beyond the destination then indicated.* * * * It is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated."

In the case at bar the appellees had no intention that the transportation should be continued beyond the destination originally indicated. They do not so claim in their bills.

In this Western Oil case there are the following statements also of convincing influence in our case:

> "Ordinarily the question whether partic-

ular commerce is interstate or intrastate is determined by what is actually done. * * * * As this court often has said, it is the essential character of the commerce * * * that is decisive.

"Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."

Public Utilities Commission vs. Landon, Receiver, 63 L., ed. 320; adv. sh. April 15, 1919.

In that case, the Kansas Natural Gas Company, of Delaware, owned a system of pipe lines extending from Oklahoma and Kansas points to some forty terminal points and cities in Kansas and Missouri, and produced, purchased, transported, distributed and sold natural gas. It undertook to supply many local companies with gas for ultimate sale to their customers. Permanent physical connections permitted gas to pass from its pipelines into the several local companies' mains. The Gas Company procured gas by drilling, purchase or otherwise in Kansas and Oklahoma, forced it through pipelines and delivered it into the local mains at the connection points. None was obtained in Missouri. The Kansas Public Utilities Commission, in view of increased cost, permitted some advance in rates, but not sufficient. The Missouri Public Service Commission suspended some proposed advanced rates. The receivers began this proceeding against the two Public Service or Utility Commissions and others, claiming that the rates fixed unduly burdened in-

terstate commerce, which the companies were carrying on by transporting and selling gas. The court below held the business carried on by the receivers—transportation of natural gas and its disposition and sale to consumers through the distributing company—was interstate commerce of a national character; that the Commissions' actions interfered with establishment and maintenance of reasonable sale rates, and thereby burdened interstate commerce.

The Supreme Court of the United States, criticizing the trial court, said:

> "We cannot agree with its conclusions that local companies, in distributing and selling gas to their customers, acted as mere agents, immediate representatives, or instrumentalities of the receivers, and as such carried on without interruption interstate commerce set in motion by them. * * * * But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers, at burner tips by the local companies acting under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce, and then disposed thereof at retail in due course of their local business."

The court had previously ruled, in the same decision, that the transportation of gas through pipelines from one state to another is interstate commerce. Shifting from pipelines to tank cars and other modes of conveying gasoline, we find

that the appellees shipped their products into this state to themselves, at their stations, for sale by their agents, locally, after the end of the products' trip. There is a close resemblance between Landon's mode of doing business with a commodity which had been transported in interstate commerce, gas, and the appellees' method of handling its commodity, oil, which had been transported in interstate commerce.

The Constitutional grant of power to Congress on the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in the exercise of the police power over local trade and manufacture.

Hammer vs. Dagenhart, 247, U. S. 251; 62 L. ed. 1101.

A foreign corporation which manufactures machines and sells them in interstate commerce, and which has a place of business within the state, where it keeps on hand a stock of assembled parts of its machine likely to be required for purposes of repair, which are sold to those who use the machine in that and adjacent states, is engaged in local business within the state, so as to be liable to an excise law.

Cheney Bros. Co. vs. Massachusetts, 246 U. S. 147; 62 L. ed. 632.

A foreign corporation is engaged in local business within a state so as to be liable to fine for failing to procure the proper certificate of authority, where it brings its machines into the state before selling them, maintains a stock of machines for exhibition and trial, sells such machines

in the state after their transportation in interstate commerce has been concluded, and they have become mingled with the general mass of property in the state, rents such machines and collects rents therefor from customers in the state at will, buys and exchanges machines for those made by other manufacturers, and sells machines so received in exchange at will, employs a mechanic in the state, and enters into contracts for repairing machines owned by persons in the state, * * * * * and keeps on hand in the state certain parts of machines and a stock of paper and ribbons suitable for use upon the machines, which are sold from time to time by the corporation's agents in the state to its customers.

Dalton Adding Machine Co. vs. Virginia, etc., 246 U. S., 498; 62 L. ed., 851.

See also:

General Ry. Signal Co. v. Virginia etc., 246 U. S. 500; 62 L. 854.

The license or occupation tax imposed in each county upon the business of selling or delivering sewing machines is not an unconstitutional interference with interstate commerce as applied to a foreign corporation, *which maintains a store or regular place of business* in each county, from which all of the local agents in such county are supplied with sewing machines and appurtenances to be taken into the rural districts for sale or rent.

Singer Sewing Machine Co. v. Brickell, Atty. Genl., 233 U. S. 304; 58 L. ed. 974.

There, as here, when a buyer is found the commodity is delivered by the agent to a customer. This decision is cited only as supporting the theo-

ry of goods come to rest after interstate shipment and carried as stock in trade.

Grain shipped from southern and western states under contracts for its transportation to eastern cities, and afterwards purchased while in transit by a resident of Illinois, with the intent to forward it promptly according to the shipping contracts, after exercising the privilege reserved therein of removing it from the cars at Chicago, for inspection, weighing, etc., may be assessed for local taxation while actually in his private grain elevator at Chicago, to which it had been removed for the aforesaid purposes.

Bacon v. Illinois, 227 U. S. 504; 57 L. ed., 615.

In this decision Woodruff v. Parham, 8 Wall., 123; Brown v. Houston, 114 U. S. 622; General Oil Co. v. Crain, 209 U. S. 211; American Steel & Wire Co. v. Speed, 192 U. S. 500, are re-affirmed.

Continuing this court said:

> "But neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state and there to dispose of it, can be deemed controlling when the taxing power of the State of Illinois is concerned. *The property was held by the plaintiff in error in Chicago for his own purposes, and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdraw-*

al did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. *He might sell the grain in Chicago or forward it as he saw fit. It was in his possession with the control of absolute ownership.* He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. *He had established a local facility (as appellees here) in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation, which was made in the usual way, without discrimination.*"

Further it said:

"Thus, goods within the state may be made the subject of a non-discriminatory tax though brought from another state, and held by the consignee for sale in the original packages," citing Woodruff v. Parham; Brown v. Houston; Pittsburg etc. v. Bates, 156 U. S. 577, 39 L. ed. 38; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754.

Further:

"The property was held within the state

> for purposes deemed by the owner to be beneficial; it was not in actual transportation; there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the state, his share of the expenses of the local government."

Armour Packing Co. v. Lacy, Treasurer, 200 U. S. 226; 50 L. ed., 451, resulted from a North Carolina law taxing "every meat packing house doing business in this state," and is in keeping with the Crain case, for, quoting from the opinion of the North Carolina Supreme Court, the Supreme Court of the United States adopted this language:

> "If the business of the defendant was solely that of shipping food products into this state, consigned directly to purchasers on orders previously obtained, it is clear that this would be interstate commerce *** but the defendant does a large business within the state, — the selling of products already stored there, on orders received after these products are thus stored."

This ruling is upon a license tax or tax upon privilege of doing business, and will later be referred to in this connection.

The massing of authorities may become tedious, but there are some obscurities in the decisions in relation to the time and place when interstate commerce has terminated and the effect of the "original package" doctrine in the light of those judgments which hold that goods coming in from

other states in interstate commerce are subject to state taxation when they reach their destination, or, in other words, come to a rest within the state to which they were sent. Hence the protraction of this subject.

The sale of goods that were at rest in the state before the sale is not protected from state legislation.

Harvey Watters v. A[illegible]igan, 63 L. ed. 57; adv. sh. January [illegible], 1919.

Arkadelphia Milling Co. v. St. Louis S. W. R. Co., 63 L. ed., 258; adv. sh. April 1, 1919.

Bacon v. Illinois, 227 U. S., 504, 57 L. ed., 16 and General Oil Co. v. Crain, 209 U. S., 211, 52 L. ed., 754, are sustained in Standard Oil Co. v. Graves, 63 L. ed., 412, adv. sh. May 15, 1919.

The controversy in which we are engaged relates to the right to tax the occupation of selling gasoline and to take two cents for every gallon sold. There is no direct tax upon the property in question. But the decisions which seem to hold that sales in original packages, though opposed by those which make it a test of the state's authority whether the goods have reached their destination or come to rest in the taxing state, justify some reference to the trend of judicial pronouncement on the subject of "original packages," additional to what has been recited.

Cook vs. Marshall County, 196 U. S., 261, 49 L. ed., 471, involves the "original package" and its taxability, apparently ruling against the state taxation, but still imports a distinction between wholesale and retail, sales to the *public generally*

and sales to a particular class, sales within and sales without the state. So of Austin v. Tennessee, 179 U. S. 343, 45 L. ed., 224, which questions rather than decides that the package is important, by the subjunctive inquiry "if it be inoperative as applied to sales by the owner in the original package," but as used in the original decision, Brown v. Maryland, the term was applied to foreign imports. Even there Chief Justice Marshall observed: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state," but he adds: "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty upon imports to escape the prohibition in the Constitution." In this Austin case, this court said, through Justice Brown, "Obviously, the doctrine of the case is directly applicable only to those large packages in which, from time immemorial, it has been customary to import goods from foreign countries." It continued: "A casual remark, however, made by Chief Justice Marshall in that case, that 'we suppose the principles laid down in this case to apply equally to importations from a sister state,' was subsequently considered in Woodruff v. Parham, 8 Wall., 123, and was held to have no application to commerce between the states." This same opinion by Justice Brown discredits the "original package" doctrine

as possibly declared in Leisy v. Hardin, 135 U. S., 100, 34 L. ed., 128, in reference to goods, beer, brought from one state into another, by the suggestion that it just slipped in and was not a question before the court for decision. In Schollenberger v. Pennsylvania, 171 U. S., 1, 43 L. ed., 49, the original package mentioned was not that kind in contemplation by Chief Justice Marshall, but such an original package as was required by a special act of Congress. It was, therefore, a legislative rather than a judicial bundle or container that was under consideration. In May v. New Orleans, 178 U. S., 496, 44 L. ed., 1165, original packages of foreign imports were the *gravamina*. In the Lincense Cases, 5 How. 608, the idea of original packages in shipments between the states as preventing state taxation was ridiculed, as it would "open the door to an almost entire evasion," and make it "obivious that the whole license system may be evaded and nullified, either from abroad or from a neighboring state."

Coming now to study Rhodes v. Iowa, 170 U. S., 42 L. ed., 1090, heedless reading would lead to the view that it is clear support for the appellees in regard to their claim that until their gasoline were sold, in the original packages, it did not become mingled with the mass of property in the state. The opinion is by Chief Justice White. We have seen how Justice Brown pulled the teeth out of the Leisy case, in the Austin case, by referring it to foreign imports. But the Rhodes case, might be considered as applying the doctrine to interstate shipments. There, however, the railroad was a common carrier. One of the boxes delivered

to the carrier was stated to contain groceries to be transported from Illinois to Iowa. Arriving at its destination the package was placed on the railroad platform and then moved into the railroad warehouse, where it was seized by the constable on the claim that it contained intoxicating liquors, which proved to be the truth. It was condemned and destroyed. Rhodes was proceeded against for illegally transporting intoxicating liquors under a law which forbade its movement within the state. "The sole question for consideration is whether the statute of the state of Iowa can be held to apply to the box in question whilst it was in transit from its point of shipment to its delivery to the consignee at the point to which it was consigned; that is to say, whether the law of the state of Iowa can be made to apply to a shipment from the state of Illinois before the arrival and delivery of the merchandise, without causing the Iowa law to be repugnant to the Constitution of the United States." Dealing with this question, Bowman vs. Railway Company was digested (125 U. S. 465) which decided that a shipment of beers was interstate commerce until delivery to the consignee, and the matter of the nature of the package was discussed, but concerning that subject the Chief Justice said:

> "The court in the course of its opinion adverted to the question whether goods so shipped continued to be protected by the interstate commerce clause after their delivery to the consignee and up to and including their sale in the original package

by the one to whom they had been delivered, but *it did not decide the question.*

The decision was limited to the transit of the goods, nor was it decided in the Rhodes case "because that question does not arise. * * * * * The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the state, we are not now called upon to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state."

After thus circumscribing the bounds of the Rhodes case, the Leisy case was construed as holding to the right to sell imported merchandise, in the original packages, free from state interference, as up to such sale the goods were not commingled with the mass of the property in the state. Thus far a conflict is engendered between those decisions of this court which limit the rule of the "original package" to foreign importations, those which state the rule of property which had reached its destination and "come to a rest," and those which discountenance the "original package" theory because at times sought to be extended beyond its proper confines. In the Rhodes case the question was as to the authority of Iowa to affect an interstate shipment of liquor the moment of its arrival within the state line by virtue of a Congressional Act, "and it is to this question that the discussion at bar has mainly related, and upon which a decision of this cause really depends." In the

Leisy case, the words "original packages" were used in the Act of Congress, which permitted the state to affect intoxicating liquor upon its arrival within the state boundary. Further, it is said in the Rhodes case:

> "It is true that the right to sell free from state interference interstate commerce merchandise was held in Leisy v. Hardin to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states. * * * The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not without the clearest implication be held to imply the purpose of subjecting to state laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, *as to which no opinion is expressed.*

American Steel & Wire Co. v. Speed *supra*, contains the latest declaration on this immediate subject written by the same Chief Justice, and is the ultimate interpretation of those principal cases which lend the only apparently substantial

sustenance to the appellees. That interpretation eliminates the pretense of pertinency from the Leisy case and others. At the risk of tiresome repetition some excerpts from that last expression will be made:

> "But the goods not having been brought from abroad, they were not imported in the legal sense, and were subject to state taxation *after they had reached their destination and whilst held in the state for sale.* This is as conclusively foreclosed by the decision of this court as is the doctrine resting upon the decision in Brown v. Maryland," citing Woodruff v. Parham and Brown v. Houston, *supra.* * * * * "The several states, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, etc."

Further:

> "But it is strenuously insisted that the principle of the cases referred to, reiterated again and again, and uniformly followed for so long a period of time, has been, by inevitable implication, overruled by the cases of Leisy v. Hardin, Lyng v. Michigan, and other cases resting on the rule expounded in those cases."
>
> "We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said, and also by the fact that, in Leisy v. Hardin, and Lyng

> v. Michigan, and most of the similar cases relied on, the decisions in Woodruff v. Parham and Brown v. Hardin were referred to without even an intimation that those cases were deemed to be overruled or even qualified. * * * *But both cases, (Leisy v. Hardin, and Lyng v. Michigan) whilst conceding that interstate commerce was completely terminated, only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases."

We may well leave this branch of the argument here, but see Susquehanna etc., Co. v. Mayor, etc., 228 U. S., 665; 57 L. ed., 1014, on the subject of property at rest in the state.

IV.

OCCUPATION AND EXCISE TAXES AND PRIVILEGE TAXES ARE NOT UNCONSTITUTIONAL BECAUSE OTHER KINDS OF BUSINESS ARE NOT AFFECTED BY THEM.

Citation of authorities will be relied on rather than quotations from them.

Ohio River, etc., v. Dittey, 232 *U. S.* 576, 58 *L. ed.*, 738.

Singer Sewing Mach., Co. v. Brickell, 233 *U. S.* 304; 58 *L. ed.*, 974.

American Steel & Wire Co., v. Speed, 192 *U. S.* 500; 48 *L. ed.*, 538.

Cargill Co. v. Minnesota, 180 *U. S.* 452; 45 *L. ed.*, 619.

Wholesale dealers in oils are not denied the equal protection of the laws by an occupation tax though no similar tax is exacted from wholesale dealers in other articles of merchandise. Equality of taxation does not mean universality of taxation.

Southwestern Oil Co., v. Texas, 217 *U. S.* 114; 54 *L. ed.*, 691.

Connolly v. Union Sewer Pipe Co., 184 *U. S.* 540; 46 *L. ed.*, 679.

Kentucky R. Tax Cas. 115 *U. S.*, 321; 29 *L. ed.*, 414.

American Sugar Ref., Co., v. Louisiana, 179 *U. S.* 89; 45 *L. ed.*, 102.

Cook v. Marshall County, 196 *U. S.* 268; 49 *L. ed.*, 473;

Armour Pack. Co., v. Lacy, 200 *U. S.*, 226; 50 *L. ed.*, 451.

Southwestern Oil Co. v. Texas is a complete review of this kind of legislation. Only one dealer may fall into the classification, yet the law be valid.

Armour Packing Company v. Lacy, supra, supporting itself by authority contains original and quoted language which will satisfactorily conclude this phase of the case.

> "The legislature could prescribe such conditions as it saw fit on the transaction of business by a foreign corporation within the state * * * * * * * and the license tax was the condition upon which defendant was permitted to do the business so described."

"The license tax applied only to business *within the state,* and not to that which was interstate in its character."

"The tax is imposed alike upon the managing agent both of domestic and of foreign houses. There is no discrimination in favor of the agents of domestic house, and, while we may suspect that the act was primarily intended to apply to agents of *ultra* state houses, there is no discrimination upon the face of the act."

"The state has the right to classify occupations and to impose different taxes upon different occupations."

"What the necessity is for such tax and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature."

"A tax may be imposed only upon certain trades and callings; for when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed. * * * It would be an intolerable burden if a state could not tax any propetry or calling unless, at the same time, it taxed all property or all callings."

V.

THE ACT WILL BE CONSTRUED AS APPLYING ONLY TO INTRA-STATE OR LOCAL COMMERCE IN THE ABSENCE OF CONTRARY CONSTRUCTION.

"Certainly in the absence of a construction by the state court of last resort to the effect that the receipts from foreign commerce are to be included, and without any attempt on the part of the taxing authorities to include them, the Federal Courts ought not to place a construction upon the act which would render it unconstitutional."

Ohio River, etc., v. Dittey, 232 U. S. 576, 58 *L. ed.*, 745.

Singer Sewing Machine Co. v. Brickell, 233 *U. S.*, 304; 58 *L. ed.*, 974.

In the latter case, under given circumstances, this court said, in the second syllabus, that the license or occupation tax * * * upon the business of selling or delivering sewing machines, may be construed, in order to avoid an unconstitutional meaning, as not intended to apply to that portion of the business conducted by a foreign corporation, which involves transactions in interstate commerce, where its business as generally conducted is wholly intrastate and free from any element of interstate commerce.

> "It is argued that the courts cannot properly sustain a statute which in direct terms applies to all commerce, by restricting it to cases of actual interference, with interstate dealings. * * * This argument, we think, misses the point. The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions, and an unconstitutional meaning can be avoided, by indulging the natural

presumption that the legislature was intending to tax only that which it constitutionally might tax. So construed, it does not apply to interstate commerce at all. The statute provides for a license or occupation tax. Normally, as the averments of the bill sufficiently show, the occupation may be and is conducted wholly intrastate, and free from any element of interstate commerce."

The court then proceeded to distinguish United States vs. Reese, 92 U. S., 214, 23 L. ed., 563; Trade Mark cases, 100 U. S. 82, 25 L. ed. 550; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, and a number of other cases.

VI

THE TWO-CENTS A GALLON TAX IS NOT A PROPERTY TAX BUT AN EXCISE OR PRIVILEGE TAX.

This proposition is clearly sound. New Mexico does not charge *ad valorem*, but on the quantity sold or consumed. It acts after sale made and not before The excise is paid only at stated periods after the delivery or use of the product.

In the Ohio tax cases (Ohio River, etc. v. Dittey, *supra*,) the appellants were Ohio railroad corporations, and had brought suit to enjoin the certification and collection by appellee of a tax which the State was seeking to enforce upon the privilege of carrying on business in that state. A restraining order allowed by the District Court and motions for temporary injunction came on before

three judges, pursuant to Sec. 266 of the Judicial Code. The temporary injunctions were refused, and the appellants came direct to this court under the same section of the Code. The tax there in question was limited in its operation to certain lines of quasi public business, specifically named in the act and therein referred to as "public utilities," including railroads. As applied to railroads, the act required the filing with the Tax Commission of each railroad doing business in the state, of a statement * * * setting forth, among other things, its "entire gross earnings, including all sums earned or charged, whether actually received or not * * * from whatever source it be derived, for business done within the state, excluding therefrom all earnings derived wholly from interstate business. * * * Such statement shall also contain the total gross earnings of such company for such period in the state from business done therein. The auditor of the state shall charge for collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, by taking four per cent of all such gross earnings, except those coming from interstate business.

It was contended that the method of determining the earnings had the effect of imposing a tax on gross receipts from foreign commerce, because such commerce is not expressly excepted. This court said:

> "The tax is, however, in substance as well as in form, an excise or privilege tax. Its reasonableness, unless some Federal right be violated, is within the discretion of

the state legislature. We have seen that the classification adopted cannot be deemed illusory."

"The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the State as guilty of a conscious offense to evade the obligation of the Federal Constitution."

"It is contended that the act is in effect a double tax upon property, * * * but, as was pointed out by the District Court, the exaction of four per cent of the gross intrastate earnings is not a property tax, but an excise tax, whose amount is fixed and measured by such earnings; and double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction. Plaintiffs in error pay one tax with respect to property, another with respect to the privilege or occupation; hence the taxation is not double."

In Woodruff v. Parham, *supra*, the fifty cents a gallon tax on whiskey or liquor is in the syllabus described "as a uniform tax imposed by a state on *all* sales made in it, whether they be made by a citizen of it or by a citizen of some other state, and whether the goods sold are the produce

of that state enacting the law or of some other state," which was held a valid taxation, the rule of which case, as has been seen, has never been departed from.

See Armour v. Virginia, 246 U. S. 1, 62 L. ed., 547.

Peck v. Lowe, 247 U. S., 165, 62 L. ed. 1049.

VII.

THERE IS NO MERIT IN THE ASSERTION, THOUGH TRUE, THAT NO GASOLINE IS PRODUCED IN NEW MEXICO.

Petroleum is produced in New Mexico in small quantities, especially in the Seven Lakes District in McKinley County, and in the San Juan Basin, in San Juan County. Its existence in this state is matter of common knowledge and official geolofical and mineralogical reports. But gasoline is not yet manufactured or extracted in that state. With us intense exploitation for oil is in progress and has been under way for at least a year; at any rate for some time previous to the passage of the law assailed. This state owns a vast amount of land under grant from Congress, and has adopted, by legislation, a policy of leasing those lands for oil search and discovery. At the same session of the legislature when the offensive statute was passed, there was also passed Ch. 98, "An Act Providing for the Leasing of State Lands for Mineral purposes and Providing for the Issuance of Limited Patents for Mineral Lands, and for other purposes." It authorized the Commissioner of

Public Lands of the State to issue leases for the exploration, development and production of coal, oil and gas, and for all oil and gas leases the state shall reecive a royalty of not less than one-eighth of the oil and gas produced, etc.

Automobiles are not manufactured in New Mexico, but that would be a poor reason upon which to say that the state had no power of taxation of the business, its sales or its property. Cases already cited sufficiently show that classification does not depend upon and is not controlled by the fact that a particular kind of property does not belong naturally to the state, but is brought in from the outside. However, on this subject, specifically in point, see

VIII.

THE LAW PROVIDES FOR INSPECTION AS AN INCIDENT.

The law does provide for inspection. It prescribes tests for the gasoline and directs that the inspector see that the law is carried out. This is incidental. New Mexico does not claim that the statute can be sustained under this inspection feature, for the taxes produced would in all reasonable judgment far exceed the cost of the service. The act has three characters, as has been shown,

one for inspection, one fixing a license tax upon the occupation or privilege, and one the excise tax.

CONCLUSION.

In the argument before the District Court, *re* Wilson, 10N. M. 32, was cited to sustain the proposition, that the imposition of a license fee as a condition upon which coal oil might be sold in the territory, in this case gasoline, is unconstitutional insofar as it applies to sales in original packages by the importer of coal oil, produced and refined without the territory. This decision was rendered in the days of tutelage as a territory and before our admission into the sisterhood of states upon an equality. It is plain however, that the territorial bench did not consider or understand the distinctions made in the cases cited to sustain its theory of original packages, which have been elsewhere discussed in this brief. It does hold that a state may tax or license a business wholly within the state, nothwithstanding the person or corporation engaged in such business may also be, either incidentally or principally, engaged in interstate business, so long as the license or tax does not refer to and is not imposed upon the business which is interstate, citing Osborn v. Florida, 164 U. S., 650 and it holds that where a license is laid generally upon the conduct of business in all forms, and without distinction as to whether it is interstate or local, and where the tax which is laid upon local business cannot be separated from that which is on interstate busi

ness, the whole tax is void, citing Crutcher v. Kentucky, 141 U. S. 47; Telegraph Co., v. Alabama, 132 U. S., 473, Ratterman v. Telegraph Co., 127 U. S., 411, Leloup v. Mobile, 127 U. S., 640, Osborn v. Florida, 164 U. S., 650. Some of these cases have hereinbefore been discussed. In the Crutcher case, a law of Kentucky required an agent of a foreign express company to take out a state license before doing business. But our law does not make that exaction. The appellees are not required to take out a license for carrying on interstate business. We deal only with property mingled with the mass in the state. The other cases cited are of similar nature, and further analogy of them will not be attempted here.

Montana asserts the rule that an act of the legislature will not be declared invalid because repugnant to the Constitution, unless its invalidity is made to appear beyond a reasonable doubt.

Shea v. North Butte Min. Co., 179 *Pac.* 501.

Washington declares that a law will not be held unconstitutional of it is within the spirit of the policy enunciated by the pertinent constitutional provision.

Mullen v. Howell, 181 *Pac.*, 920.

Both of these cases, of course, relate to state constitutions.

For all of the foregoing reasons, the temporary

injunction should be dissolved and the cause dismissed, and remanded for that purpose, with costs in all the intermediate courts and in this court.

Respectfully submitted,

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A. B. RENEHAN, *Special Assistant Attorney General of the State of New Mexico.*

Of Counsel:

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Office Supreme Court, U.
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JAMES D. MAHER
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APPELLEES' SUPPLEMENTAL BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

Nos. 521, 522 and 523, Consolidated.

O. O. ASKREN, Attorney General of the State of New Mexico, et al.,

Appellants,

vs.

THE CONTINENTAL OIL COMPANY,

Appellee.

O. O. ASKREN, Attorney General of the State of New Mexico, et al.,

Appellants,

vs.

SINCLAIR REFINING COMPANY,

Appellee.

O. O. ASKREN, Attorney General of the State of New Mexico, et al.,

Appellants,

vs.

THE TEXAS COMPANY,

Appellee.

Appeal from the District Court of the United States for the District of New Mexico.

STEPHEN B. DAVIS, JR.,
E. R. WRIGHT,
Solicitors for Appellees.

MILTON SMITH, W. H. FERGUSON,
CHARLES R. BROCK, ELMER L. BROCK,
Of Counsel for Appellees.

INDEX.

CASES CITED.

THIRD POINT.

FOURTH POINT.

FIFTH POINT.

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APPELLEES' SUPPLEMENTAL BRIEF.

STATEMENT OF THE CASE.

Owing to the fact that the oral argument in these cases has been advanced to an early date, it

was necessary for counsel to prepare the main brief on behalf of the appellees without the opportunity to first inspect appellants' brief. This situation justifies counsel who sign this brief in submitting an additional argument both by way of an original brief and as an answering brief to that of appellants.

We accept the statement of the case made in appellees' main brief as the statement of the case in this supplemental brief, calling special attention at this point to the provisions of Section "5" of the Act, in addition to the specific portions of the Act set forth in the statement of the case contained in the original brief:

> "Sec. 5. It shall be unlawful for any person (except tourists or travellers to the extent hereinafter provided) to use any gasoline not purchased from a licensed distributor of gasoline or retail dealer in gasoline in this State without paying the tax at the rate of two cents per gallon upon the use thereof.
>
> "Every person who shall use any gasoline not purchased from a licensed distributor of gasoline, or licensed retail dealer in gasoline in the State shall on or before the tenth day of each calendar month render to the State Auditor a true statement of all gasoline so purchased and used during the preceding month and shall at the time of making such return accompany the same with remittance of an amount of money equal to a total of two cents per gallon upon all gasoline so used, which amount shall be paid over to the State Treasurer. * * * * *"

In presenting this brief, we shall endeavor to avoid repetition of matters, or citation of authorities, contained in the main brief.

ARGUMENT.

THE APPELLEES CANNOT BE CLASSED AS MERELY LOCAL MERCHANTS, NOR CAN THEIR PARTICULAR COMMODITIES BE SAID TO HAVE COME TO REST WITHIN THE STATE AS TO ORIGINAL PACKAGES SO AS TO BE SUBJECT EITHER TO THE LICENSE TAX OR THE SO-CALLED "EXCISE TAX" OF TWO CENTS PER GALLON.

The converse of this proposition is presented by counsel for the appellants under their first and third points. It is contended that because the bill shows upon its face that appellees, in addition to doing an interstate business, also ship "gasoline, as aforesaid, from some or all of the states aforesaid, in tanks, barrels, or packages, and sell said gasoline, so shipped, from said tanks, barrels, or packages, in such quantities as the purchaser desires," that this in itself establishes the status of the appellees as local merchants and manifests that the gasoline so brought into New Mexico for seal is at rest in New Mexico and comingled with the general property of the state, and therefore subject to any and all forms of taxation that may be devised by the Legislature of the State of New Mexico.

In support of their contention, counsel cite the following cases:

Woodruff v. Parham, 8 Wall., 132;
Hinson v. Lott, 8 Wall., 148;
Kehrer v. Stewart, 197 U. S., 60;
Brown v. Houston, 114 U. S., 622;
American Steel & Wire Co., v. Speed, 192 U. S., 500;
General Oil Co., v. Crain, 209 U. S., 211;

Public Utilities Commission v. Landon, Receiver, 63 Law. Ed., 320;
Dalton Adding Machine Co., v. Virginia, 246 U. S., 498;
General Railway Signal Co., v. Virginia, 246 U. S., 500;
Singer Sewing Machine Co., v. Brickell, 233 U. S., 304;
Bacon v. Illinois, 227 U. S., 504;
Armour Packing Co., v. Lacy, 200 U. S., 226.

An examination of the foregoing authorities shows that in every case the court had under consideration a tax law of the particular State which imposed a general tax. In the cases of Brown v. Houston, *supra,* General Oil Co. v. Crain, *supra,* and Bacon v. Illinois, *supra,* the particular tax in question was a general property tax, similar to that levied upon all other property, of all kinds, within the State.

The cases of Kehrer v. Stewart, *supra,* Armour Packing Co. v. Lacy, *supra,* and Singer Sewing Machine Co. v. Brickell, *supra,* are all cases involving license or privilege taxes for the right of doing business, and, in each instance, the State Court held that the particular tax was intended to and did operate only on intrastate business, and this court held that it was bound by the construction given to the statute by the State Court; that the construction so given the Act by the State Court was as much a part of the statute as though in terms written into the same and must be given effect as part of the statute. The same conclusion was reached by this court in the case of Howe Machine Co., v. Gage, 100 U. S., 676. In the case of Southwestern Oil Co. v. Texas, 217 U. S., 114, involving a privilege or license tax upon wholesale dealers in oil in the State of Texas, this court refused to discuss the possible effect of the tax as a

burden upon interstate commerce, for the reason that the question was not properly before this court.

The cases of Dalton Adding Machine Co. v. Virginia, *supra,* and General Railway Signal Co. v. Virginia, *supra,* are not in point for the reason that they involve the validity of a tax on a foreign corporation doing business within the State of Virginia, and this court held upon the facts in each case that they were doing an intrastate business within the State of Virginia and were therefore liable to the tax.

In the case of Public Utilities Commission v. Landon, Receiver, *supra,* it was held, where the pipe line company obtained its natural gas from outside the State of Kansas, brought it into the State of Kansas through its pipe lines and then turned it over to local distributing companies at a price determined on a percentage of the selling price obtained by the local distributing companies, that the interstate feature of the business was complete when the pipe line company delivered the gas to the local distributing companies, and hence the local distributing companies were subject to regulation by the public utilities commissions of the States of Kansas and Missouri.

This leaves for consideration the three cases of Woodruff v. Parham, *supra,* Hinson v. Lott, *supra,* and American Steel & Wire Co. v. Speed, *supra.*

In the case of Woodruff v. Parham, *supra,* the charter of Mobile authorized the city to impose a municipal tax on real and personal estate, *auction sales,* and sales of merchandise, capital employed in business and income within the city. The plaintiff in error was an auctioneer and commission merchant, selling goods originating within the State of Alabama and also goods brought in from other states in the original packages.

He contended that as to goods sold by him in original packages, which had been brought into the state from other states that he was not liable to the tax.

The court in its decision distinguished the case of *Brown vs. Maryland* and concludes with the following language:

> "We are satisfied that the question, as a distinct proposition necessary to be decided, is before the court now for the first time.
>
> But, we may be asked, is there no limit to the power of the States to tax the produce of their sister States brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory
>
> The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the product of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by the citizens of Alabama. *But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore void.* There is also, in addition to the restraints which those provisions impose by their own force on the States, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exer-

cise of this power, in such a manner as to prevent the State from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another."

It will be noted in considering this decision that the court specifically holds that under the facts in the case there was no attempt made to discriminate injuriously against the products of other states or the rights of their citizens. But the court specifically holds that any law having such operation would be an infringement of the provisions of the Constitution and therefore void.

The court also declares that the power of Congress is unquestioned as to its right to regulate commerce between the states.

The distinction between this case and the case at bar is plain. In the Parham case the license tax imposed is a general tax or license upon the right to sell as a public auctioneer and includes all kinds and classes of merchandise. In the case at bar the license tax is imposed upon distributors of gasoline with the distinct provision prohibiting the distribution of gasoline (which in New Mexico is distinctly an imported product, there being no gasoline produced in New Mexico) unless the license fee shall be paid.

The case of Hinson v. Lott, *supra*, also arose in the state of Alabama and involved a state tax law prohibiting the offering for sale of liquor within the state by any dealer or dealers introducing such liquor from without the state without the prior payment to the tax collector of the county of a tax of fifty cents per gallon upon each and every gallon thereof.

Upon the argument of this case no other sections of the Alabama statute except the one above mentioned were referred to and the court in discuss-

ing these provisions standing alone used the following language:

> "If this section stood alone in the legislation of Alabama on the subject of taxing liquors, the effect of it would be that all such liquors brought into the State from other States and offered for sale, whether in the original casks by which they came into the State or by retail in smaller quantities, would be subject to a heavy tax, while the same class of liquors manufactured in the State would escape the tax. *It is obvious that the right to impose any such discriminating tax, if it exists at all, cannot be limited in amount and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without while the privilege would remain unobstructed in regard to articles made in the State. If this can be done in reference to liquors, it can be done with reference to all the products of a sister State, and in this mode one State can establish a complete system of non-intercourse in her commercial relations with all the other States of the Union.*"
>
> * * * * *
>
> "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.
>
> But a careful examination of that statute shows that it is not obnoxious to this objec-

tion. A tax is imposed, by the previous sections of the same Act, of fifty cents per gallon on all whiskey and all brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come, in the light of these earlier sections of the Act, to examine the 13th, 14th and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State. As the effect of the Act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States."

It is interesting to note in connection with the paragraph first quoted from the majority opinion what is said by Mr. Justice Nelson in his dissenting opinion.

"The people of one State have the right of egress and regress to and from any other

for the purposes of trade and commerce, and the articles may be taxed by the State into which they are carried; but there must be no discrimination. We have gone back to the Articles of Confederation, and have incorporated into the Constitution, by construction, a provision which the framers of that instrument had rejected as wholly inadequate for the protection of inter-state commerce. Instead, therefore, of adopting this article into that instrument, they adopted a more complete and thorough security to the enjoyment of the privileges of this commerce—'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports.'

Why this change? If there had been no diversity of soil or climate in the States of the Confederacy, or in the mineral riches of the earth, any commercial regulation among them would have been of little importance. Foreign trade and commerce would have been their only dependence for a market of their surplus productions. The products would, as a general rule, have been common among all the States. But the fact was otherwise. From the diversity of soil and climate the Middle and Eastern States were mostly grain growing States, and their surplus products were flour, pork, beef, butter and cheese, with a modicum of the manufacture of woolens.

The Southern States were cotton, tobacco and rice growing States. It was the exchange of these commodities that constituted the bulk of interstate commerce.

Virginia and North Carolina looked to the Middle and Eastern States for their products in exchange for tobacco, tar, rosin and tur-

pentine; South Carolina and Georgia for their cotton and rice. Now, the provision in the Articles of Confederation securing egress and regress for the purpose of trade and commerce furnished no protection to either State. New York and Pennsylvania could lay a tax upon all sales of cotton, tobacco or rice within these States, which would be a tax without any discrimination; and yet it would be, in fact, in its operation and effect, exclusively upon these Southern products. So in respect to the wheat, flour, pork, beef, butter and cheese, when shipped to these Southern States. Each State not producing the article sold, the general tax would not affect their people. We have no doubt the case before us falls within this category.

Alabama is a cotton growing State, and depends upon the Northern States bordering on the Mississippi and Ohio Rivers for most of her corn, wheat and flour. She cannot be, therefore, a State largely engaged in the manufacture of whisky. The tax, so far as regards her own people, is probably nearly nominal. We seefrom the above view why this non-discriminating article in the Confederation was not incorporated into the Constitution. It was entirely worthless as a protection against the taxation of the inter-state commerce.

The same results will follow, applying the principle to commerce among the States as it exists at the present time. The State of Pennsylvania supplies New York with the article of coal from her mines which is consumed in that State. The trade is very great, and is increasing every year as the facilities for the conveyance of the article, by railroads, into the interior of the State are multiplied.

According to the judgment of the court in the present case, the State of New York may tax these sales if she makes no discrimination. She may, therefore, pass a law imposing a tax on all sales of coal in the State, as the State of Alabama has done in respect to sales of whiskey. Such a law may be passed and enforced without imposing any burden upon her own people, as there is no coal of any comparative value in the State but what is brought into if from abroad. So, in turn, Pennsylvania can tax the salt and plaster of New York,, carried into that State, with like impunity to her people. Massachusetts may tax the grain and flour of the West, carried into the State, by a like law, as she does not raise a sufficient supply for home consumption, and a general tax upon all sales would not harm her people. In like manner she can tax the cotton and rice of the Southern States and sugar of Louisiana, and those in turn can tax her cotton, woolen manufactures and shoes carried into those States. The lumber of Wisconsin can be taxed at Chicago, its principal port, by a general law of Illinois, without any serious prejudice to the interests of the people of that State. The gold-dust and gold and silver bars of California carried to New York can be taxed upon a like principle without prejudice to her people."

The case of American Steel & Wire Co. v. Speed, *supra,* involved the validity and constitutionality of a general merchants and privilege tax imposed under the laws of Tennessee.

The tax laws of the State of Tennessee provided for a general advalorem tax upon all property; second, for a merchants tax, separate from the

general ad valorem levy. This merchants tax was of two kinds:

(a) A tax upon average capital invested in business;

(b) A privilege tax.

The plaintiff in error was a New Jersey corporation, engaged in the manufacture of various steel and wire products, with its manufacturing plant located outside the State of Tennessee. It had a distributing plant at Memphis; the Patterson Transfer Company acting as its agent and distributor. Traveling Salesmen and Agents, as a general rule, took orders for the goods in Tennessee and surrounding territory, including the State of Arkansas. These goods were then shipped to Memphis and distributed to purchasers in Tennessee, Arkansas and surrounding territory. The great majority of the goods, if not all of them, were in the original package.

In supplying local jobbers at Memphis, the orders were usually filled directly on the Memphis warehouse, the Memphis Office forwarding the order and dray receipt to the Chicago office. This is a sufficient statement of the facts for the purpose of considering the case.

In the opinion of the court, by Chief Justice White, after holding that the goods in the warehouse in Memphis were not in transit, but, on the contrary, had reached their destination, and that, therefore, there was no question as to the power of the state to levy the merchants tax because the goods were still in interstate commerce as being in transit, the court proceeds to consider the power of the state of Tennessee to tax the goods in the warehouse as still being in the original package.

It was contended in this case that the early cases of Woodruff v. Parham, 8 Wall. 123, Brown v. Houston, 114 U. S. 622, had been overruled by inevitable implication by the cases of Leisy v.

Hardin, 135 U. S. 100 (the Iowa Prohibition Case) and Lyng v. Michigan, 135 U. S. 161 (also a Prohibition Case). In commenting upon this, the court said:

> "We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said, and also by the fact that, in Leisy v. Hardin and Lyng v. Michigan, and most of the similar cases relied on, the decisions in Woodruff v. Parham and Brown v. Houston were referred to without even an intimation that those cases were deemed to be overruled or even qualified. The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. It results from assuming that the rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains. Brown v. Maryland illustrates the first of these cases, while Woodruff v. Parham, Brown v. Houston, Leisy v. Hardin, Lyng v. Michigan, are examples of the other. Thus in Brown v. Maryland there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibtion. In other words, that imports could not be taxed at all until they had completely lost their character as such. Woodruff v. Parham and Brown v. Houston, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to re-

sult in a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in Brown v. Maryland—that is sale in the original packages at the point of destination—was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation, in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce. In Leisy v. Hardin and Lyng v. Michigan the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the state to tax them, but its authority to treat the goods as not the subjects of interstate commerce, and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purposes of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular ex-

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ertion of state authority considered in the respective cases."

If we correctly understand the reasoning of the court in the Speed case, the merchant's tax is upheld upon the authority of Woodruff v. Parham and Brown v. Houston, cited *supra*.

Woodruff v. Parham was a general tax upon auctioneers who dealt indiscriminately with merchandise produced both without and within the State of Alabama. Brown v. Houston involved a general property tax. Referring to the rule laid down in these two cases, this court said:

> "The several States, therefore, not being controlled as to such measures by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, *without discrimination, like other property situated within the State.*"

This court does not refer, in its opinion, to the earlier decision in Hinson v. Lott.

The only one of the cases cited by counsel for the appellants which involves a so-called "excise tax" at all similar to the tax of two cents per gallon involved in the case at bar, appears to be the case of Hinson v. Lott, *supra*.

In considering this case, it must be borne in mind that subsequent to the decision in Leisy v. Hardin, 135 U. S., 100, Congress yielded to the states the same control over intoxicating liquors shipped into the state, whether in original packages or otherwise, that the states had over like products produced in their respective territories. Bearing in mind the reasoning of Chief Justice Marshall in the case of McCullough v. Maryland,

4 Wheaton, 316, to the effect that the power to tax involves the power to destroy, it is difficult to distinguish the case of Hinson v. Lott, *supra,* from the case of Leisy v. Harden, *supra,* and Lyng v. Michigan, 135 U. S., 161. If the State of Alabama had the power to require the payment of an excise tax of fifty cents a gallon on liquor shipped from without the State in original packages, before the same could be sold in such original packages, then, within the principles announced in Leisy v. Harden, and Lyng v. Michigan, *supra,* it had the power, by imposing a prohibitive tax, of absolutely preventing the bringing into the State of Alabama of intoxicating liquors or the sale of the same in the original packages after they were brought in, assuming that a similar prohibitive tax was placed upon all intoxicating liquors produced within the State of Alabama. The dissenting Justices in the case of Leisy v. Harden, *supra,* took the position that a State had this power, under the police powers reserved to the states.

In the case at bar, so far as the license tax is concerned, the appellees are absolutely prohibited from engaging in interstate business except upon payment of the license. The statute specifically provides, in Section 8 that they shall not engage or continue in the business of selling gasoline without a license, as provided in the Act, and subjects them to a fine in case they do not obtain a license as provided in Section 2.

> "The term *distributor of gasoline* means every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this State."

Whether we construe the words: "not purchased from a licensed distributor of gasoline in this State" as limiting the word "gasoline" or as limiting the words "tanks, barrels or packages," it is clear that a distributor may not sell or use gasoline brought into this State in original packages until such distributor has taken out the license provided in the Act. No other construction of the language used is possible, nor is there any chance to construe the language so used as relating only to intrastate business, as the law specifically requires the taking out of a license as a condition precedent to either selling or using gasoline brought into the State in interstate commerce in the original package or container.

Not content with this, it is thereafter provided that the distributor cannot sell or use any gasoline so brought into the State in original packages, or containers, except upon payment of a so-called "excise tax" of two cents per gallon. That it was the clear intent of the Legislature to tax interstate commerce is still more clearly apparent when we refer to Section 5 of the Act:

> "It shall be unlawful for any person, (except tourists or travellers to the extent hereinafter provided) to use any gasoline not purchased from a licensed distributor of gasoline or retail dealer in gasoline in this State without paying the tax at the rate of two cents per gallon upon the use thereof."

A literal enforcement of the provisions of this section would mean that a resident of New Mexico could not purchase gasoline at El Paso, Texas, or Trinidad, Colorado, ship it to his place of business in the State of New Mexico in the original package, and there use it, except upon a payment to the State of a tax of two cents per gallon for the

privilege of buying the same and having it shipped into the State in interstate commerce. The fact that the tax is assessed upon the use of the article (in effect a consumption tax) does not lessen the burden upon interstate commerce

As stated in the original brief, no State has ever attempted to enforce this kind of taxation since the days of the old Confederacy of States.

If the states have this power, what is to prevent the state from assessing a prohibitive tax upon the use of gasoline within the State of New Mexico? There being no gasoline produced within the State of New Mexico, the result would be that no gasoline could or would be brought within the State of New Mexico. Coffee is not produced within the State of New Mexico. If we substitute the words "wholesalers" in lieu of the expression "distributors," as used in the statute in question, and the word "coffee' wherever the word "gasoline" is used in the statute, New Mexico could then prohibit the use of coffee within the State of New Mexico. The same thing could be said of hundreds of other articles of commerce which are not produced within the boundaries of this state. If New Mexico has this power, other states have the same power and it would be but a short time before we would again be confronted with the same condition that existed in the original thirteen states prior to the adoption of our Federal Constitution. Mr. Justice Nelson clearly points out the evils which would arise in event it be held that the states have the power to enact legislation of the sort here attempted.

From a review of the authorities cited by appellants, we therefore think it is clear that the determining factor in this case is not the proposition advanced by counsel for the appellants under their first and third points; that this case is not to be determined from the mere fact that part

of the appellees' business is intrastate and part interstate, or from the fact that the gasoline shipped into the State by the appellees in original containers and packages and there held by them for sale in such original packages, has come to rest within the State and is therefore subject to the general taxing laws of the State, taxed the same as other property within the State is taxed, but is to be determined in the light of what was attempted by the Legislature by the Act as a whole; that the license tax and the so-called "excise tax" of two cents per gallon were and are assessed against the privilege and right to sell an article within the State of New Mexico which only comes into the State of New Mexico in interstate commerce and, particularly, against the right to sell such article of interstate commerce in the original package or container.

Citation of authority is unnecessary to the proposition that the right to sell in the original package is an inherent part of the right to bring the gasoline in in interstate commerce.

In the case of ex parte Kieffer. 40 Fed, 402, Mr. Justice Brewer, then sitting as United States District Judge, uses the following language:

> "The moment you find any act of the legislature, or any ordinance of a city, which prevents the free exchange of lawful articles of commerce between the states, you find an act or ordinance which contravenes the commerce clause of the United States Constitution."

In the case of The Pullman Company v. Kansas, 216 U. S. 56, Chief Justice White, in his concurring opinion, states, summarily, certain dominant propositions, as being so conclusively established by the previous decisions of this court as to be now beyond dispute, as follows:

"1. A state may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. This is so elementary as to require no reference to the multitude of authorities by which it is sustained."

"2. Even though a power exerted by a state, when inherently considered, may not, in and of itself, abstractly impose a direct burden on interstate commerce, nevertheless, such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerse, or, what is equivalent thereto, discriminates against the right to carry it on."

The final expression of this court appears in the case of Standard Oil Company v. Graves, supra, and it is to be noted that counsel for appellants make no attempt to discuss or distinguish this case.

II.

THE NEW MEXICO STATUTE CANNOT BE CONSTRUED AS APPLIED ONLY TO INTRASTATE OR LOCAL COMMERCE.

Counsel for appellants, under their fifth point, contend that the New Mexico Act must be construed as applied only to intrastate or local commerce in the absence of contrary construction, and in support of this proposition they cite; Ohio River, etc., v. Dittey et al. 232 U. S. 576 and Singer Sewing Machine Ci. v. Brickell, 233 U. S. 304.

We take it that the quotation from the Brickell case, which appears in appellants' brief at page 64, completely refutes their argument. It is true

that there has been no construction of the New Statute by the New Mexico courts. No construction applying the provisions of the Act solely to intrastate business is possible in the face of the positive provisions of the act itself.

Norfolk & W. R. Co., v. Pennsylvania, 136 U. S., 114, 119, 34 L. ed. 394, 397;
Crutcher v. Kentucky, 141 U. S. 47, 62, 35 L. ed., 649, 654;
Galveston, H. & S. A. R. Co., v. Texas, 210 U. S., 217, 52 L. ed. 1031;
Western Union Tel. Co., v. Kansas, 216 U. S., 1, 54 L. ed., 355, 366;
Williams v. Talladega, 226 U. S. 404, 419, 57 L. ed., 275, 281.

III.

ASSUMING THAT THE TAX IS VOID AS IT IMPOSES A BURDEN UPON INTERSTATE SHIPMENTS OF GASOLINE SOLD IN ORIGINAL PACKAGES, WILL THAT VITIATE THE ENTIRE ACT, OR MAY THE COURT PROPERLY DECLARE THE LAW TO BE INVALID AS TO INTERSTATE SHIPMENTS OF THE CHARACTER MENTIONED AND NEVERTHELESS SUSTAIN IT AS TO INTRASTATE SALES, USE AND DISTRIBUTION?

The rule stated in International Text-book Company v. Pigg, 217 U. S. 91, 54 L. ed. 678 by Mr. Justice Harlan is as follows:

> "It is well settled that if a statute is in part unconstitutional, the whole statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope

of the statute that they cannot be separately enforced, or, if so enforced, will not effectuate the manifest intent of the Legislature. In Allen v. Louisiana, 103 U. S., 80, 84, this court referred with approval to what Chief Justice Shaw said on this point in Warren v. Charlestown, 2 Gray, 84. Referring to the rule obtaining in cases of statutes in part constitutional and in part unconstitutional, that eminent jurist said: 'But, if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislatiue intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.' "

The Supreme Court also approved the same principle in the Income Tax Cases (Pollock v. Farmers Loan & Trust Co., 158 U. S. 599), referring to and approving the holding of the same court in the earlier case of Poindexter vs. Greenhow, 114 U. S. 270.

In the case of Poindexter v. Greenhow, the court said:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the

legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one that they may never have been willing by itself to enact. An illustration of this principle is found in the TRADE MARK CASES, 100 U. S. 82, where an act of congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the states, was held to be void altogether, because it embraced all commerce, including that between citizens of the same state, which was not within the jurisdiction of congress, and its language could not be restrained to that which was subject to the control of congress. 'If we should,' said the court in that case, (page 99) 'in the case before us undertake to make, by judicial construction, a law which congress did not make, it is quite probable that we should do what, if the matter were now before that body, it would be unwilling to do.' "

The case of Caldwell v. State ex rel, 119 N. E. 999 discusses the same principles at length.

After citing several cases to the principle that the Act of 1901, being both an inspection act and a revenue measure, was void as placing a burden upon interstate commerce, the court says:

"The decision in the case last cited (Foote v. Clagett, 116 Md. 228, 81 Atl. 511) is authority here for the holding that, as section 5 of the act of 1901 is unconstitutional as to oil and petroleum products transported into the state from other points, *it must be held void as to oil produced and sold within the*

state, since the Legislature will not be presumed to have intended to discriminate against citizens of Indiana in favor of those beyond its limits."

In the case of Foote v. Clagett, *supra,* the Supreme Court of Maryland, in construing the oyster inspection law of that state said:

"We regret that we are forced to hold that this law is void for the reason stated, but we cannot escape that conclusion. As was said in State v. C. & P. R. R. (40 Md. 22). *'It would not be fair to indulge a presumption that the Legislature would have passed the act in question with a knowledge that it could only be effectual as to the coal (oysters) transported within the state, and thus intentionally have discriminated against the citizens of the state and in favor of those beyond its limits."*

See also the following cases which fully support the foregoing principles of law:

Martin v. Taylor (N. D.) 60 N. W. 392; 25 LRA 838.

Cooley's Constitutional Limitations, 5th Ed. 213.

U. P. R. R. Co., v. A. T. & S. F. 28 Kansas 453.

Western Union Tel. Co., v. Austin (Ks.) 72 Pac. 850.

Passaic Water Co., v. Patterson, 65 N. J. L. 472, 475.

City of Hannibal v. M. & K. P. Co., 31 Mo. Appls, 23.

Village of Saratoga Springs v. Van Norther, 77 NYS 1020.

Gilbert-Arnold Land Co., v. City of Superior, 91 Wis. 353.
Warren v. Mayor, 2 Gray, 84.
Trade Mark cases, 100 U. S. 82.
State vs. C & P. R. R. 40 Md. 22.
In re Wilson, 10 N. M. 32.

IV.

THE NEW MEXICO STATUTE IS VOID UNDER THE FOURTEENTH AMENDMENT.

The leading case on the general subject is Bell's Gap R. Co. v. Penn. 134 U. S. 232.

In this case the question arose as to whether a statute of Pennsylvania subjecting bonds and other securities issued by corporations, to a higher rate of taxation than was imposed on other moneyed securities, was a denial of the equal protection of the laws to corporations. The court said:

> "All corporate securities are subject to the same regulations. The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may al-

low deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usages, are within the discretion of the state legislature, or the people of the state, in framing their Constitution. *But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.* It would however, be impracticable and unwise to attempt to lay down any general rule or difinition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the 14th Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

The Supreme Court of the United States again considered this question in the case of Connolly v. Union Pipe Sewer So., 184 U. S. 540 at 562.

"A tax may be imposed only upon certain callings and trades, for when the state exerts

its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intilerable burden if a state could not tax any property or calling unless, at the same time, it taxed all property or all callings.

Its discretion in such matters is very great, and should be exercised solely with reference to the general welfare, as involved in the necessity of taxation for the support of the state. *A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States.*

The same doctrine was again reaffirmed in the case of Magoun vs. Illinois Trust and Savings Bank 170 U. S. 283, see also Cook vs. Marshall Co. 196 U. S. 268; and Armour Packing Co. v. Lacy 200 U. S. 226.

V.

SECTION I, ARTICLE VIII, OF THE NEW MEXICO CONSTITUTION.

Under their sixth point counsel for the appellants concede that the tax of two cents per gallon is not a property tax, and contend that it is a privilege or excise tax. This contention was induced, unquestionably, because of the provisions of the New Mexico Constitution.

"Section I. Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class."

In the face of this constitutional provision an arbitrary tax of two cents per gallon could not be sustained as a property tax, or as a tax upon tangible property. The New Mexico Act imposes a tax of two cents per gallon upon each gallon of gasoline sold or used within the State of New Mexico.

As stated in the main brief, the attempt to tax the use and enjoyment of gasoline, or of any other commodity, as distinct from general property taxes upon such commodities, is a startling innovation in the scheme of State Taxation.

Ownership of property includes three elements: (a) possession; (b) enjoyment and use; (c) right to dispose of same. The New Mexico statute attempts to impose a tax burden upon the right to sell or dispose of gasoline *as a business,* and also attempts to tax *the use and enjoyment* of all gasoline brought into the state not passing through the hands of a licensed dealer in gasoline, and this is done under the guise of a statute designated as an inspection law, but containing no provision for inspection, and which is in fact a revenue law. To avoid the prohibition contained in the Constitution, the Legislature designates the two cent tax as an "excise tax."

The gasoline is subject to the general property tax as is all other property within the state. To single out gasoline, a commodity only coming into New Mexico in interstate commerce, and impose an additional burden upon this commodity clearly violates the New Mexico constitution.

It has been repeatedly held that a flat tax of so much per gallon upon gasoline, kerosene and other petroleum products, which is greatly in excess of the cost of inspection, cannot be sustained as an inspection tax under the police powers of the state, and that such tax is in fact imposed for revenue purposes. Constitutional provisions prohibit

the collection of an arbitrary fee or tax as a property tax, or as a tax upon tangible property, as stated in the New Mexico constitution.

Counsel for appellants apparently contend under their eighth point that the act can be sustained pro tanto as an inspection law. They even insist that the law provides for inspection, when, as a matter of fact, all it does is to provide soft berths for political favorites who certainly do not have to inspect any gasoline whatever their other duties may be.

This brings the case squarely within the decision of this court in the case of Standard Oil Company vs. Graves, decided April 14th 1919. In that case the state court attempted to justify the tax as an excise or privilege tax, being restrained from holding it good either as a property tax or an inspection tax. In the case at bar, the Legislature has attempted to justify the tax as a privilege or excise tax. (The tax of two cents per gallon).

As a matter of fact and law the two cent tax is an attempted property tax and as such void under the New Mexico Constitution.

State vs. Cumiskey, 97 Kan. 343; 155 Pac. 47.

Bartles Northern Oil Co., vs. Jackman, 150 N. W. 576.

CONCLUSION

We therefore submit that the New Mexico Statute, Chapter 93, New Mexico Session Laws, 1919, is void and unconstitutional as a direct burden upon interstate commerce and, being unquestionably void in so far as it attempts to and does burden interstate commerce, is void in toto; that the statute is also void under the 14th amendment;

and under the provisions of the New Mexico Constitution.

Santa Fe, New Mexico, December 20, 1919.

Respectfully submitted,

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INDEX

Cases Cited

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

Nos. 521, 522 and 523.

O. O. ASKREN, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, ET AL.,
APPELLANTS,
v.
THE CONTINENTAL OIL COMPANY,
APPELLEE.

O. O. ASKREN, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, ET AL.,
APPELLANTS,
v.
SINCLAIR REFINING COMPANY,
APPELLEE.

O. O. ASKREN, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, ET AL.,
APPELLANTS,
v.
THE TEXAS COMPANY,
APPELLEE.

APPEALS FROM TEMPORARY INJUNCTION ORDERS OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW MEXICO, GRANTED UNDER SECTION 266 OF THE JUDICIAL CODE BY JUDGES SANBORN, COTTERAL AND BOOTH.

BRIEF FOR APPELLEES.

Statement.

These cases present two questions:

1. *May a state single out an article of commerce not produced within its own territory and burden, by tax or otherwise, the right to sell or use that article when imported from other states?*

2. *Does a state have the power to exact tribute for the privilege of importing goods in due and regular course from other states and selling them in the packages or containers in which imported?*

The appeals are prosecuted from orders entered by Judges Sanborn, Cotteral and Booth on behalf of the District Court of the United States for the District of New Mexico, under Section 266 of the Judicial Code, granting to the appellees, The Continental Oil Company, Sinclair Refining Company and The Texas Company, corporations organized under the laws of the states of Colorado, Maine and Texas, respectively, temporary injunctions restraining the appellants from the enforcement of an act of the legislature of the State of New Mexico entitled, *"An Act providing For An Excise Tax upon the sale or use of Gasoline and For a License Tax to be Paid by Distributors and Retail Dealers Therein; Providing for Collection and Application of Such Taxes; Providing for the Inspection of Gasoline and Making it Unlawful to Sell Gasoline Below a Certain Grade without Notifying Purchaser thereof; Providing Penalties for Violations of this Act and For Other Purposes;"* approved March 17, 1919. (See page 12 Transcript of Record in each of the cases.)

The entire act in question is set forth in the appendix and will also be found as chapter 93, page 182, Session Laws of New Mexico, 1919, but specific attention is directed to certain provisions of sections 1, 2 and 3.

Section 1 provides:

"The term distributor of gasoline means every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this state.

The term *retail dealer in gasoline* means a person, other than a distributor of gasoline, who sells gasoline in quantities of fifty gallons or less."

Section 2 declares:

"Every distributor of gasoline shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency.

Every retail dealer in gasoline shall pay an annual license tax of five dollars for each place of business or agency."

Section 3 provides:

"There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this state after July 1st, 1919, which tax shall be paid as hereinafter provided at the rate of two cents per gallon upon all gasoline so sold or used."

The jurisdiction of the Federal Court in each of the cases is based upon the contention that said state law is in violation of sections 8 and 10 of Article I of the Constitution of the United States.

In the stating part of the bill in No. 521 it is alleged:

> "That the plaintiff is, and at all times herein named, has been engaged in business as a merchant and in buying and selling gasoline and other petroleum products; that in the usual and regular course of its business the plaintiff purchases gasoline in the states of Colorado, California, Oklahoma, Texas and Kansas, and from each and all of said states ships gasoline into the state of New Mexico, there to be sold and delivered to its customers in said state; that in the usual and ordinary method for the conduct of its business which has been adopted and had long been in use prior to the enactment of the statute aforesaid, and which is still in use, the plaintiff purchases in the states of Colorado, California, Oklahoma, Texas and Kansas, or in some one of said states, gasoline and ships said gasoline in tank cars from the state in which purchased into the state of New Mexico, and there, according to its custom and the ordinary method in the conduct of its business, it sells in said tank car or cars the whole of the contents thereof to a single customer, and before the package or packages in which the gasoline was shipped have been broken; that in the usual and regular course of its business it purchases gasoline in one of the states

aforesaid other than the state of New Mexico, and ships the gasoline so purchased from that state in barrels and in packages containing not less than Two (2) 5-gallon cans into the state of New Mexico, and there, in the usual and ordinary course of its business, without breaking said barrels or packages, containing said cans, it is accustomed to sell and was accustomed to sell prior to the enctment of the law aforeaid the gasoline in said original barrels and packages, and according to said custom the said gasoline is sold and delivered to the customers of the plaintiff in precisely the same form and condition as when received in the state of New Mexico; that the gasoline purchased, shipped and sold as aforesaid in said tank cars, barrels and packages containing cans of gasoline is not purchased from a licensed distributor of gasoline in the state of New Mexico, and accordingly the plaintiff, in shipping, selling and disposing of gasoline in the manner aforesaid, is a distributor of gasoline as the term 'distributor' is defined by the aforesaid act of the legislature of the state of New Mexico; that plaintiff has in the state of New Mexico thirty-seven (37) stations to which it ships gasoline from time to time in the regular course of its business in the manner hereinabove described, and from which it sells gasoline in the manner above stated; that said act of the legislature of the state of New Mexico requires the plaintiff to pay the sum of fifty dollars ($50) per annum for each of its said stations as an annual license tax for the privilege of shipping and selling gasoline in in-

terstate commerce in the manner aforesaid, and said act declares it to be unlawful for any person to distribute or sell gasoline after July 1, 1919, without having paid said license tax; that said act requires the plaintiff to make application to the Secretary of State, who is authorized to issue said license, and to accompany said application with a remittance of the amount of the license; that said act further exacts of the plaintiff that it shall pay for the privilege of shipping and selling gasoline in interstate commerce in the manner aforesaid what the act terms an excise tax of two cents (2c) for each and every gallon of gasoline so as aforesaid shipped and sold; that for the privilege of engaging in interstate commerce in the manner aforesaid said act further requires that the plaintiff shall render to the State Auditor a monthly statement in such form as said Auditor shall prescribe of all gasoline received and sold by the plaintiff during the preceding month, accompanied by a remittance of the amount of money equal in the aggregate to two cents for each gallon shipped and sold in interstate commerce in the manner aforesaid; that it is provided by said act that any person who shall engage or continue in the business of selling gasoline in the state of New Mexico without paying said taxes for the privilege of doing so shall be deemed guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than One Hundred Dollars ($100) nor more than One Thousand Dollars ($1,000), or by imprisonment in the county jail for not more

than ninety (90) days, or by both such fine and imprisonment, and it is further provided by said act that any person failing to pay said license tax shall be enjoined in an action brought in the name of the state from further distributing or selling gasoline in the state of New Mexico; that it is further provided that to said tax shall be added as a penalty five per cent (5%) of the amount thereof, and a monthly interest of one per cent (1%) until it shall be paid, and that it shall be the duty of the State Treasurer to cause suit to be brought in the name of the state to collect such tax, penalty and interest, and it is declared to be the duty of the Attorney General of the State of New Mexico and the District Attorney to commence and prosecute such suit or suits at the request of the Treasurer; that said taxes constitute an unlawful burden upon interstate commerce, and the act of the legislature aforesaid imposing such taxes for the privilege of engaging in interstate commerce as aforesaid is in conflict with those provisions of the Constitution of the United States hereinabove mentioned and is absolutely void; that said act of the legislature of the state of New Mexico provides for the appointment of inspectors, one for each of the eight judicial districts of the state, but said inspectors are not required by said act to inspect any gasoline sold or used in said state, and no inspection of gasoline sold in the state of New Mexico is required to be made; that all gasoline sold, used or distributed in the State of New Mexico is imported into the state in interstate commerce, and

no gasoline is produced in the state of New Mexico; that in addition to the sale of gasoline as aforesaid the plaintiff ships gasoline as aforesaid from some or all of the states aforesaid in tanks, barrels or packages, and sells said gasoline so shipped from said tanks, barrels and packages in such quantities as the purchaser desires.

That upon and after the first day of July, 1919, unless prevented by writ of injunction of this Honorable Court, the defendants will seek to enforce the said unconstitutional act of the legislature of New Mexico, and unless the plaintiff submits to the unlawful exactions and pays the said unlawful charges for the privilege of continuing in business, defendants will enjoin the plaintiff from the conduct of its business and will cause the officers and agents of the plaintiff at each and all of its various stations aforesaid to be arrested, prosecuted, and fined and if it continues to carry on and conduct its business in interstate commerce as aforesaid without paying to the state of New Mexico the sums of money exacted by said act for the privilege of doing so suits will be started from time to time for the collection of said unlawful exactions for the privilege of engaging in interstate commerce, and the plaintiff's business destroyed or materially injured, and the plaintiff will be subjected to the burden of a multiplicity of suits to enforce the collection of said unlawful exactions, and its officers and agents will be hampered and restrained by arrests and prosecutions unless it submits to said unlawful exactions; that immediate and ir-

reparable injury and damage will result to the plaintiff before this cause can be heard on notice duly and regularly given, unless a temporary restraining order is granted."

The corresponding portion of the bills in Nos. 522 and 523 are identical with the quotation from the bill of The Continental Oil Company, except as to the number of stations which the other appellees have in the state of New Mexico, the Sinclair Company having three stations and The Texas Company thirteen stations.

Motions to dismiss were interposed by appellants in each of the cases and were denied by the court.

(See pp. 6 and 7 of the Transcript of Record in each case.)

No answer has been filed, and the allegations of the bill of complaint in each case are admitted, or at least are not controverted.

ARGUMENT.

I.

DIFFERENTIATION BETWEEN LAWS OBNOXIOUS AND LAWS NOT OBNOXIOUS TO THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES; CITATION OF AUTHORITIES ILLUSTRATIVE OF THE LATTER FOR THE PURPOSE OF SHOWING THEIR INAPPLICABILITY TO THE CASE AT THE BAR, AND GENERAL STATEMENT OF REASONS WHICH RENDER THE NEW MEXICO STATUTE AN UNLAWFUL BURDEN UPON INTERSTATE COMMERCE.

If we have correctly analyzed the decisions of this court, state laws which have been declared obnoxious to the Commerce Clause of the Constitution of the United States may properly be classified as follows:

1. *Laws which are the exertion of a power not possessed by the states because exclusively delegated to the Congress.*

2. *Laws which may be said to be the exertion of a power possessed by the states, but which by their express provisions or by the necessary result of their practical enforcement discriminate against interstate commerce.*

Armour & Co. v. Commonwealth of Virginia, 246 U. S. 1.

From the second proposition stated it of course follows that laws which are the exertion of a power

possessed by the state, but which do *not*, either expressly or in their practical enforcement, discriminate against interstate commerce are valid.

We venture the following classification of valid laws of this character:

(a) *Laws imposing taxes upon property in general within the state, and without discrimination against that acquired or used in interstate commerce.*

The principle thus stated will find illustration in a long line of decisions, including such cases as:

Woodruff v. Parham, 8 Wall. 123;
Hinson v. Lott, 8 Wall. 148;
Brown v. Houston, 114 U. S. 622;
Coe v. Errol, 116 U. S. 517;
Leloup v. Port of Mobile, 127 U. S. 640;
Pittsburgh & S. Coal Co. v. Bates, 156 U. S. 577;
Diamond Match Co. v. Ottonagon, 188 U. S. 82;
American Steel & Wire Co. v. Speed, 192 U. S. 500;
General Oil Co. v. Crain, 209 U. S. 211;
Bacon v. Illinois, 227 U. S. 504;
Susquehanna Coal Co. v. Mayor of South Amboy, 228 U. S. 665.

The principle is restated by Mr. Justice Hughes in *Bacon v. Illinois*, 227 U. S. *Supra*, where, referring to the plaintiff in that case, he said:

> "He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination."

In *Woodruff v. Parham,* Mr. Justice Miller, referring to certain language employed by Chief Justice Marshall in *Brown v. Maryland,* said:

> "If the court then meant to say that a tax levied on goods from a sister state which was not levied on goods of a similar character produced within the state, would be in conflict with the clause of the Constitution giving Congress the right 'to regulate commerce among the states,' as much as the tax on foreign goods, then under consideration, was in conflict with the authority 'to regulate commerce with foreign nations,' we agree to the proposition."

Then, referring specifically to the case under consideration, he said:

> "The case before us is a simple tax on sales of merchandise imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and

the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama."

In *Brown v. Houston,* the tax there involved was sustained upon the specific ground that it was imposed upon all property alike, and without discrimination. Respecting the particular property involved the court said:

> "It had become a part of the general mass of property in the state, and as such it was taxed for the current year (1880) as all other property in the City of New Orleans was taxed. Under the law it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

In *Leloup v. Port of Mobile,* it was said:

> "But this exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage and taxation of property of a telegraph company within a state."

These excerpts are sufficient to illustrate the principle held to be controlling in all of the cases cited and in others of like character which might be collected. The statute in question does not purport to be a property tax; but, if, in order to sustain it, it should be urged that it is a property tax, and then, in order to avoid its discriminating effect against interstate commerce, it should be further urged that the statute is based upon a legitimate classification, the statute would be brought into direct conflict with section 1 of Article VIII of the Constitution of New Mexico, which reads:

> "Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class."

If a property tax the statute is void under the state constitution because it is not levied upon or determined by the value of the property.

(b) *Laws enacted under the police power which do not discriminate against property acquired or used in interstate commerce, including local regulations and health laws, although affecting commerce incidentally, and inspection laws which do not impose a burden upon interstate commerce unreasonably in excess of the cost of inspection.*

As illustrative of the principles announced reference is made to the following:

Mobile County v. Kimball, 102 U. S. 691;

Escanaba & L. M. Transportation Co. v. Chicago, 107 U. S. 678;

Parkersburg & O. R. Transportation Co. v. Parkersburg, 107 U. S. 691;

Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S. 455;

Mugler v. Kansas, 123 U. S. 623;

Smith v. Alabama, 124 U. S. 465;

Leloup v. Port of Mobile, 127 U. S. 640;

Nashville, etc. R. Co. v. Alabama, 128 U. S. 96;

Kimmish v. Ball, 129 U. S. 217;

Voight v. Wright, 141 U. S. 62;

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345;

New Mexico, ex rel. v. Denver & R. G. R. Co., 203 U. S. 38;

Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380;

Foote v. Stanley, 232 U. S. 494;

Armour & Co. v. Commonwealth of Virginia, 246 U. S. 1;

Pure Oil Co. v. Minnesota, 248 U. S. 158;

Standard Oil Co. v. Graves, ... U. S. .....

The statute in question cannot be sustained within the principle of these authorities. It does not purport to be an inspection measure. It requires no inspection to be made. It expressly provides that the fund raised shall be devoted to purposes other than defraying the cost of inspection. It cannot properly

be construed as an inspection measure, but if so construed it is obviously invalid when tested by the doctrine of *Standard Oil Company v. Graves, supra,* and the authorities therein cited.

To recapitulate, the statute does not purport to impose a property tax, and if it did it is in direct violation of the Constitution of New Mexico; it is not a police measure looking to the health, comfort or safety of the public, nor an inspection measure; nor a regulation of a mere matter of local concern affecting commerce only in an incidental or negligible manner.

Having thus anticipated and, as we confidently submit, successfully met any argument based upon the theory that the statute in question imposes a property tax or a legitimate inspection tax, we propose to show that it is a tax upon the *right* of the appellees to conduct interstate commerce in the ordinary way and according to their established custom.

When the statute is considered in its various aspects it will be found to be the attempted exertion of a power which the state does not possess, or, if within the power possessed, that the practical enforcement of the statute will necessarily constitute a direct burden upon and a discrimination against interstate commerce, and this for the following reasons:

1. *It singles out an article of commerce not produced in the State of New Mexico, and which reaches that state only by interstate commerce, and imposes the tax upon the right to sell or use that article.*

2. *It violates the "original package" rule repeatedly announced by this court.*

Before entering upon a discussion of these questions, which we shall present in the order stated, we beg to say an additional prefatory word.

In our argument we shall purposely refrain from adverting to that line of cases which give support to excise tax laws as against the contention that they violate the Due Process or Equal Protection clauses of the Fourteenth Amendment, as being utterly without application. We shall also leave out of consideration those cases dealing with the doctrine of legitimate classification by the states for taxation purposes. Conceding all that may be urged as to this doctrine, it is certain that it will not permit the classification to be based upon what *is* and what is *not* produced within the state. The instant this is attempted the state law, regardless of the name it bears, and regardless of the question as to whether the classification would be reasonable when tested by the Due Process or Equal Protection clauses of the Constitution, becomes a burden upon interstate and foreign commerce, and is brought into direct conflict with sections 8 and 10 of Article I of the Constitution.

This statement will enable us also to eliminate such cases as *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 577, and *Southwestern Oil Co. v. Texas*, 217 U. S. 115, and cases therein cited.

Nor shall we discuss those cases which have sometimes held the statute, although void in part, to be valid in other respects, for the reason that, in the circumstance of this case, however the law in question may be viewed or construed, the necessary and inevitable result of its practical enforcement, either against the distributor or retail dealer, will constitute

a direct and discriminatory burden upon interstate commerce.

II.

THE NEW MEXICO STATUTE SINGLES OUT AN ARTICLE OF COMMERCE NOT PRODUCED IN THE STATE OF NEW MEXICO, AND WHICH REACHES THAT STATE ONLY BY INTERSTATE COMMERCE, AND IMPOSES THE TAX UPON THE RIGHT TO SELL OR USE THAT ARTICLE.

To make a pretense in suits of this character of adding to the learning which the Commerce Clause of our federal organic law has elicited, and with which the reports of this court are pregnant, would be an unjustifiable presumption. Indeed, it is a kind of presumption to attempt to argue the cases at all. Every doctrine involved has become common learning. Nevertheless, the amazing venture made by the state of New Mexico justifies a brief consideration of the character of the power assumed. The legislature of that state, not as a police, inspection or health measure, not as a general and uniform property tax measure, and yet obviously for revenue purposes, has attempted to exercise a power which, so far as we are advised, no state has hitherto attempted. It has singled out a legitimate article of commerce not produced in that state and has imposed a tax upon the right to sell or use that article when brought from

other states in the regular course of interstate commerce.

We say the tax is imposed upon the right to sell or use that article. This is obviously true, because, before exercising the right to sell, the person, importing gasoline in commerce from other states into New Mexico, under severe penalty, is required to procure and pay for a license; and, after procuring such license, if he then exercises the right of selling gasoline, he is further taxed because he availed himself of the right. This additional tax is measured by the number of gallons of gasoline sold. Or, if he imports the gasoline in commerce for his own use and exercises the right of use, then this statute exacts of him the payment of two cents for every gallon which he may use.

As was said by Chief Justice Marshall in *Brown v. Maryland,* and repeated by Chief Justice Fuller in *Leisy v. Hardin,* it was the power of the original states under the Confederacy over the subject of commerce which probably contributed as much or more than any other influence to the adoption of the present system vesting in the Congress the exclusive power to regulate commerce. Strange to say, New Mexico now attempts to exert this very power which no state has possessed since the adoption of the Constitution of the United States. If New Mexico may single out one article of commerce not produced within her borders and impose a tax upon the right to sell or use that article when shipped into the state in the ordinary course of interstate commerce, then she may impose a like burden upon the right to sell or use every article of commerce which she does not

produce and which may be shipped from other states into her territory. If she may thus tax the right to sell or use within her borders the products of other states of a kind which she does not produce, she may entirely prohibit the sale or use within her borders of all such products.

If New Mexico may thus discriminate against Texas, Oklahoma, Kansas, Colorado and California, or other states producing an article of commerce known as gasoline which New Mexico does not produce, she may burden, by tax or otherwise, the right to sell or use within her borders tobacco shipped from the state of Kentucky, oysters shipped from the state of Maryland, corn shipped from the states of Illinois or Nebraska, wheat shipped from Minnesota or the Dakotas, woolen goods manufactured in any of the states of New England, or cotton goods in any of the states of the South; and these states in turn, or any of them, may retaliate by taxing or prohibiting entirely the right to sell or use within their respective borders any or all articles of commerce produced in New Mexico. If New Mexico may thus single out any article of commerce not produced within her borders and tax, otherwise burden or prohibit the right to sell or use such article of commerce within her own limits, she may likewise tax, burden or prohibit the right to sell or use tea, coffee or any other product shipped into the state of New Mexico from foreign countries.

It is certain that the court, in considering the necessary and inevitable effect of the practical operation of a state law, may find that the statute is as clearly the attempted exertion of a power not pos-

sessed as if its meaning, when so determined by its practical operation, had been unambiguously, unequivocally and frankly stated in the act. The meaning of the statute under consideration, tested by its necessary and inevitable operation if enforced, is precisely the same as if the statute had expressly declared *that no person, corporation, firm, co-partnership or association shall have the right to sell or use gasoline shipped from Texas, Oklahoma, Kansas, Colorado or California, in the packages in which shipped or otherwise,* without first procuring and paying for a license as specified in the act, nor without assuming the obligation, if the right to sell or use is exercised, of paying the additional exaction of two cents for each gallon sold or used. This meaning is inevitable and results from the fact that no gasoline is produced in New Mexico, a fact truly alleged in each of the bills and not controverted upon this record. To have been entirely frank the legislature of New Mexico should have inserted a preamble to the act in question reciting that, *"Whereas, no gasoline is produced in New Mexico and it is desired, in addition to any valid ad valorem tax which may be assessed against gasoline shipped from other states and taxed in common with other property in the state, to raise revenue for highway purposes by a tax upon the right to sell or use gasoline that may be shipped into the state from Texas, Oklahoma, Kansas, Colorado, California or other states of the United States or from foreign countries; therefore, be it enacted"* as set forth in the statute under consideration. The fact, however, that this purpose was not frankly recited in no respect conceals the situation, for, as said

by this court in *Henderson v. Wickham*, and *Commissioners of Immigration v. The North German Lloyd*, 92 U. S. 259:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from foreign shores and landed at the Port of New York, it is as much a tax on passengers, if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases."

See:

Passenger Cases, 7 How. 284;
Minnesota v. Barber, 136 U. S. 313;
Crew-Levick Company v. Pennsylvania, 245 U. S. 292;
Standard Oil Co. v. Graves, ... U. S. ....

In the latter case, speaking of the state law there in controversy, Mr. Justice Day said:

> "It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void."

Accordingly we say that, notwithstanding any attempted concealment of the purpose of the statute here under consideration, its real purpose must be

determined by its natural and reasonable effect; and if it is apparent that the object of this statute, when judged by that criterion, is to compel persons to pay a sum of money for the right to sell or use gasoline in New Mexico which they bring into that state from other states or foreign countries, then, whatever the form of the language employed, it constitutes a tax upon both interstate and foreign commerce. This conclusion is in no respect affected by the fact that the appellees in these cases, while showing that, in the regular course of business, they ship gasoline into New Mexico from some or all of the other states named in their bills, have not shown that they import gasoline into New Mexico from foreign countries.

So far as we have discovered this is the first instance where a state has thus sought to discriminate against her sister states and the products thereof which are of a kind not produced within the state enacting the discriminating law. While the precise point was not involved, Mr. Justice Miller, in *Woodruff v. Parham*, 8 Wall., *supra*, very clearly indicated, *arguendo*, that the law then under consideration would have been declared invalid if, either by its express terms, or by its practical enforcement, it had constituted a burden upon the sales of products of other states not produced in the state of Alabama. As justifying his conclusion that the law was not a burden upon interstate commerce, he said that the tax was imposed alike upon all sales made in Mobile, *"whether the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states."* (Italics ours.) This is only another way of saying

that, if the law in question had singled out a product of some other state not produced in the state of Alabama and had imposed the tax upon that product alone, the law would have constituted an unlawful burden upon commerce.

It is perfectly obvious, therefore, that the New Mexico statute is a direct burden upon and a regulation of interstate and foreign commerce. Such an astounding assumption by a state of a power exclusively vested in Congress necessitates a recurrence to fundamental principles and justifies at least a brief review of some of the great cases decided by this court. When this becomes necessary the profession is always remitted for a starting point to the celebrated cases of *Gibbons v. Ogden,* 9 Wheat., 1, and *Brown v. Maryland,* 12 Wheat., 419.

In the first of these cases the great Chief Justice, who then presided over the court, placed clearly before him the words of the Constitution, *"Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes,"* and then proceeded to analyze them. After defining the word "commerce" and the word "among" to his satisfaction and, as it is believed, to the satisfaction of all subsequent students of constitutional law, he came to determine the extent and the exclusiveness of the power conferred upon the Congress, and said:

> "We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others

vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Again considering the extent and meaning of the power vested by the Commerce Clause of the Constitution in the Congress, in *Brown v. Maryland,* he said:

"What, then, is the just extent of a power to regulate commerce with foreign nations and among the several states?

This question was considered in the case of *Gibbons v. Ogden* (9 Wheat. 1) in which it was declared to be complete in itself and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is

proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. * * *

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the ar-

ticles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation. * * *

It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state."

Applying these principles, and always and ever keeping in mind that the only exception, if any, subsequently engrafted thereon, is the rule stated in the first part of this brief that property, although not yet sold, after being shipped in interstate commerce, but which has acquired a *situs* in the state to which shipped, may be taxed by that state *in common with and in the same manner as other property in the state is taxed*, they cannot but conduct to a sound conclusion. Indeed, they are unquestioned and have been repeated and restated in every subsequent case where it has been deemed proper for the court to go back to fundamental principles to get its bearings. Even Chief Justice Taney, the vigorous advocate for the preservation of what he conceived to be the rights reserved to the states, did not fail in the *License Cases* (5 How.) to admit that the *controlling* and *supreme* power over commerce with foreign nations and among the several states is vested in Congress, although at that time he maintained, what has since been most positively and unequivocally repudiated by this court, that the states were free to regulate

commerce among the states in the absence of affirmative action by Congress.

A few of the multitude of cases subsequently holding that the power to regulate commerce is exclusively vested in Congress, and that a state may not, under any guise, directly burden the prosecution of interstate commerce, are the following:

Bowman v. Chicago & N. W. R. Co., 125 U. S. 465;

Leloup v. Port of Mobile, 127 U. S. 640;

Western Union Telegraph Co. v. Alabama, 132 U. S. 473;

Leisy v. Hardin, 135 U. S. 100;

Crutcher v. Kentucky, 141 U. S. 47;

Osborne v. Florida, 164 U. S. 650;

Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217;

International Text Book Co. v. Pigg, 217 U. S. 91;

Crew-Levick Co. v. Commonwealth of Pennsylvania, 245 U. S. 292;

Standard Oil Co. v. Graves, ... U. S. ....

In *Leloup v. Port of Mobile, supra*, it was said:

"No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce

and amounts to a regulation of it which belongs solely to Congress."

In *International Text Book Co. v. Pigg*, 217 U. S., *supra*, Mr. Justice Harlan, speaking for the court, said:

> "It is the established doctrine of this court that a state may not, in any form, or under any guise, directly burden the prosecution of interstate commerce."

In *Crew-Levick Co. v. Commonwealth of Pennsylvania*, 245 U. S., *supra*, Mr. Justice Pitney said:

> "The * * * imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be by its necessary effect a tax upon such commerce, and, therefore, a regulation of it, and for the same reason to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this court that it is necessary to do little more than refer to a few of the most pertinent (citing cases). Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce so far as the present question is concerned."

In *Standard Oil Co. v. Graves*, *supra*, decided last April, Mr. Justice Day said:

> "The general principle that a state may not impose burdens upon interstate commerce is so

well settled, and has been so often declared in the opinions of this court, that a repetition of the reasons which have induced these decisions would be superfluous."

After commenting upon the fact that all decisions upon this question had sustained the national character of our Union, the distinguished lawyer and scholar who is now President of The American Bar Association, Hon. Hampton L. Carson, in his superb history of the Supreme Court of the United States at page 11 of Volume 1, said:

> "Had the decisions been the reverse of what they were and affirmed the pretensions of the States, which had been uniformly sustained by their own highest tribunals, the character and condition of our country would have been transformed into a scene of conflict between vexatious restrictions upon interstate commerce, and the States themselves would have been converted into prison cells, from which none could escape except upon payment of gate-money to the gaoler."

In view of these authorities confirming beyond the possibility of further controversy the exclusive power of Congress under the Commerce Clause of the Constitution to regulate commerce among the states, the conclusion is impelling and absolutely irresistible that no state may tax or otherwise burden the right to sell or use any article of commerce shipped from other states or countries, and especially that no state may single out any article of commerce not produced within its own borders and tax or otherwise burden

the right to sell or use that article when shipped into its territory from other states or foreign countries.

III.

ORIGINAL PACKAGE RULE.

The statute of New Mexico is a manifest violation of what is known as the "original package" rule. The appellees in these cases severally, in the regular course of their business, according to a plan still prevailing, which prevailed at the time of the enactment of the statute and which for years prior thereto had prevailed, ship from Texas, Oklahoma, Kansas, Colorado and California, or from some of these states, gasoline in tanks, barrels and packages, each of the latter containing two 5-gallon cans, which they respectively sell in the tanks, barrels and packages in which shipped. Gasoline so purchased, acquired and shipped from other states is, of course, not purchased from a licensed distributor in New Mexico. Accordingly, by the express terms of the statute, the appellees must each procure a license before sales can be made in the manner stated. Moreover, after paying for and procuring the license which enables them to sell their packages of gasoline without subjecting themselves to prosecution for violation of the law, they must, if they exercise the right of selling, pay the additional tribute of two cents for each gallon of gasoline sold as aforesaid in the packages in which shipped. The fact that the former is called a *license* and the latter an *excise* tax in no respect conceals

the burden which is imposed upon the appellees for exercising the right of shipping in interstate commerce and selling the goods shipped in the original packages.

When it is kept in mind that the tax in question is not a general property tax, and, because of the constitutional limitation of the State of New Mexico hereinabove quoted, cannot be such tax, not being based upon the value of the property taxed, it becomes very clear that those cases which had under consideration a tax imposed upon all property alike and without discrimination, including property shipped from other states and still remaining in the original packages but which had acquired a situs in the taxing state, are utterly without application. This enables us to lay the case of *Woodruff v. Parham*, 8 Wall. 123; *American Steel & Wire Co. v. Speed*, 192 U. S. 500; *General Oil Co. v. Crain*, 209 U. S. 211, and *Bacon v. Illinois*, 227 U. S. 504, on one side as not applicable to the case at the bar; and when it is remembered that the decision in *Peirce v. New Hampshire*, one of the License Cases reported in 5 How. 504, only sustained the New Hampshire law, exacting a license tax for the privilege of selling spirituous liquors, upon the sole theory that the state was privileged to impose this burden upon liquors shipped from other states so long as Congress had taken no affirmative action on the subject, and that upon this particular point that case was overruled by the decision in *Leisy v. Hardin*, 135 U. S., we may also lay the Peirce case aside as being without application to the case at the bar. This leaves as the only

pertinent cases discussing the "original package" doctrine the following:

Brown v. Maryland, 12 Wheat. 419;
Leisy v. Hardin, 135 U. S. 100;
Lyng v. Michigan, 135 U. S. 161;
Rhodes v. State of Iowa, 170 U. S. 412;
Schollenberger v. Commonwealth of Pennsylvania, 171 U S. 1;
F. May & Co. v. City of New Orleans, 178 U. S. 496;
Austin v. Tennessee, 179 U. S. 343;
Cook v. Marshall County, 196 U. S 261;
Standard Oil Co. v Graves, .. U. S. ....

A brief review of these cases will demonstrate that the statute of New Mexico, when tested by the doctrine which they announce, must fall.

In *Brown v. Maryland* the following language was used:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has beome incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

And the Chief Justice added:

> "We suppose the principles laid down in this case to apply equally to importations from a sister state."

Leisy v. Hardin was a replevin action for the recovery of 122 quarter barrels of beer, 171 one-eighth barrels of beer and eleven sealed cases of beer which the marshal of the city of Keokuk had seized under a prohibition law of the state of Iowa. The vessels containing the liquor were the original packages in which it had been shipped into the state of Iowa from the state of Illinois.

The question presented for this court was as to whether the state of Iowa could lawfully prohibit the sale of liquors shipped from another state.

The subject is reviewed at great length. Practically every decision previously made by this court growing out of a conflict between state action and the Commerce Clause of the Federal Constitution is cited and reviewed, and the conclusion reached that the law of the state of Iowa was unconstitutional.

Referring to the case of *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S., Chief Justice Fuller said:

> "While the determination of whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was in terms reserved, yet the argument of the majority con-

ducts irresistibly to that conclusion, and we think we cannot do better than repeat the grounds upon which the decision was made to rest. It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States."

The *Leisy* case and *Lyng v. Michigan,* to same effect, were decided in April, 1890. In the following August Congress enacted a law the purpose of which obviously was to yield to the states the same control over intoxicating liquors shipped into the state, whether in original packages or otherwise, that the states had over like products produced in their respective territories. It, of course, will be noted that the act of Congress was applicable alone to intoxicating liquors, and in no respect affected any previous decisions of

this court with respect to the general doctrine controlling interstate commerce shipments.

In the case of *Rhodes v. State of Iowa*, 170 U. S., *supra*, the present Chief Justice of this court had occasion to consider a number of the previous decisions and the effect thereon of the act of Congress just mentioned. He rendered very certain the meaning of the expression "original packages," as that meaning had been established by judicial authority at that time. He said:

> "The words 'original packages' had, at the time of the passage of the act by the decisions of this court, acquired with reference to the construction of the Constitution a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a state by the receiver thereof, although state laws might forbid the sale of merchandise of like character not in such packages."

No one can study the decisions of this court and entertain the slightest doubt as to the accuracy of this definition, and the meaning thus ascribed to the expression has been in no respect modified except in its application to intoxicating liquors.

The next "original package" case in order is *Schollenberger v. Commonwealth of Pennsylvania*, 171 U. S., *supra*.

This case involved the validity of a statute of Pennsylvania prohibiting the sale of oleomargarine. The oleomargarine was sold in packages of ten and forty pounds, in both instances the sale being made

in the original packages. After showing that the oleomargarine had become a proper subject of commerce among the states, and with foreign nations, Mr. Justice Peckham reviews many authorities, including *Gibbons v. Ogden, Brown v. Maryland, Bowman v. Chicago & Northwestern Ry. Co., Leisy v. Hardin,* adheres to the doctrine of those cases, refers to the Wilson Act, being the act of Congress above mentioned, and to its effect upon the importation of intoxicating liquors, shows by a decision of this court that said act was a valid exercise of congressional power, and then says:

> "In the absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state."

And finally concluded his opinion as follows:

> "The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the state to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the state law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interfere with in-

terstate commerce. It cannot, for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome. The act of the legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another state and its sale in the original package, as described in the special verdict, is invalid."

The case of *F. May & Company v. City of New Orleans,* 178 U. S., *supra,* determined that the box, case or bale in which many parcels of goods are shipped, and not any individual parcel within the box, case or bale, constitutes the original package within the meaning of the doctrine under consideration.

This brings us to the case of *Austin v. Tennessee,* 179 U. S., *supra.*

The law involved was an act of the legislature of the state of Tennessee declaring it to be a misdemeanor punishable by a fine of not less than fifty dollars for any person to sell or offer to sell, or to bring into the state, for the purposes of gift or other disposition, cigarettes or cigarette paper.

Austin had been convicted under this statute and upon writ of error from this court to the Supreme Court of Tennessee claimed that the act was void because it constituted a burden upon interstate commerce.

The cigarettes in question were placed in small boxes with ten cigarettes in a box. Great quantities of these boxes, unaddressed, were delivered to the ex-

press company in another state and transported in a basket belonging to the express company and delivered to the purchaser in the state of Tennessee. It was claimed that each box of cigarettes was an original package within the meaning of the "original package" doctrine announced in the cases above mentioned.

At great length the doctrine and the cases are again considered. The case of *Leisy v. Hardin* is reviewed and with respect to the packages of beer involved in that case Mr. Justice Brown, speaking for the court, said:

> "It was held that, being articles of lawful commerce, the state could not, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister state; or, when imported, prohibit their sale by the importer, and that they did not become a part of the common mass of property within the state so long as they remained in the casks in which they were imported and continued to be the property of the importer. No question was made with regard to the casks being original packages, or as to the fact that, according to the custom of brewers, beer was usually and ordinarily imported from one state to another in casks of this size."

The court concluded that the small boxes containing ten cigarettes each did not constitute an original package within the meaning of the doctrine applicable to such packages, and upon this ground, and

this ground alone, the court declared that the pretended shipment in boxes was not a good faith transaction, but carried on its face evidence of an effort to evade the effect of the statute.

In the majority opinion the present Chief Justice concurred, but in doing so he expressly declared that he did not understand that anything in the opinion of the court impaired the doctrine "protecting original packages from interference by the police or any other power of a state, as announced by so many opinions of this court, especially as expounded in *Leisy v. Hardin*, 135 U. S. 100, and *Rhodes v. Iowa*, 170 U S. 412, and the authorities which are cited in the opinions of the court in both of those cases."

He further said:

> "Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is, Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court? I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their

shipment, they could not, under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package."

Chief Justice White thus concurred after placing this interpretation upon the language of the majority opinion, and we submit that no one can now read that opinion and fail to concur in the interpretation given thereto by the learned justice in his specially concurring opinion.

It may not be improper to note that Mr. Justice Brewer, with Mr. Chief Justice Fuller, Mr. Justice Shiras and Mr. Justice Peckham concurring, was of the opinion that even these boxes of ten cigarettes each constituted original packages in that form so as to render the Tennessee law a burden upon interstate commerce.

The next case which discussed the "original package" doctrine is that of *Cook v. Marshall County*, 196 U. S., *supra*.

This again involved the validity of a law of the state of Iowa which was in substance the same as the law of Tennessee last discussed, the only difference being that the Tennessee statute was entirely prohibitory, while the Iowa law imposed a tax of three hundred dollars per annum upon all persons selling cigarettes. The cigarettes were shipped in the same manner as in the Tennessee case, in small boxes containing ten cigarettes each, with this difference only, that the express company this time did not furnish the basket in which the small boxes were placed for shipment. An effort was made to have this court re-

view its decision in the Austin Case. That case, however, was followed, with Chief Justice Fuller, Mr. Justice Brewer and Mr. Justice Peckham dissenting.

The present Chief Justice again concurred in the majority opinion, but upon precisely the same basis that he had concurred in the opinion in the Austin Case. He said:

> "The only difference between this and the *Austin Case* is that in this no basket was used to hold the many small packages shipped at one and the same time to the same person. In my opinion, such fact is not sufficient to take the case out of the reach of the reasoning stated by me for concurring in the decree in the *Austin Case*. For the reasons given for my concurrence in that case I concur in the judgment rendered in this."

It is thus rendered as clear as the noonday that, so far as the doctrine under consideration is concerned, it is utterly immaterial whether the statute is absolutely prohibitory in its terms, or whether it simply exacts tribute in the form of a license tax. In either event, if the goods are shipped from one state to another in good faith original packages there cannot be the slightest doubt but that the right attaches, under the Commerce Clause of the Constitution of the United States, to sell the goods so shipped in the packages in which shipped without paying tribute of any sort to the state for the privilege of doing so.

So far as we have been able to discover the last utterance on the subject was made by Mr. Justice Day

in the case of *Standard Oil Co. v. Graves, supra.* It involved the validity of what was called the "State Oil Inspection Law" of the State of Washington. It provided for an inspection, but exacted fees unreasonably in excess of the cost of inspection. Because of a state constitutional limitation the Supreme Court of Washington had held that the statute could not be sustained as imposing a property tax, and in order to sustain it had treated it as an excise or occupation tax upon the business of selling oil within the state.

Adverting to this construction, Mr. Justice Day said:

> "While this court follows the decisions of the highest court of the state as to the meaning of statutes in cases of this character, the name given the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void."

Coming, however, to the particular point under consideration, the learned justice continues:

> "In this case the amended complaint alleges that the oils were shipped into Washington from California. They are brought there for sale. This right of sale as to such importations is protected to the importer by the Federal Constitution; *certainly while the same are in original receptacles or containers in which they are brought into the state.*" (Italics ours.)

A review of the earlier of this most interesting line of cases begets a certain degree of disappointment, in that the doctrines announced and conclusions reached by the majority were not always approved by all of the members of this great tribunal. It is gratifying, therefore, to find that finally, in the *Austin* and *Cook Cases*, all of the members of the court, while not in entire agreement as to whether a pasteboard box, containing ten cigarettes shipped loosely or in a basket with many other like boxes, without any address, constitutes an original package, were nevertheless in absolute accord respecting the general doctrine applicable to good-faith original packages which entitles such packages to be sold within the state by the receiver thereof, even though state laws might forbid the sale of merchandise of like character but not shipped or sold in such packages. And it is especially reassuring that there was no dissent whatever by any member of the court as now constituted from the reaffirmance of that doctrine by Mr. Justice Day last April in *Standard Oil Co. v. Graves, supra,* when, speaking of importations of merchandise from the state of California into the state of Washington, he declared that the right of sale of such importations is protected to the importer by the Federal Constitution "certainly while the same are in original receptacles or containers in which they are brought into the state."

In conclusion it may not be inappropriate to call attention to a decision of the Supreme Court of New Mexico with respect to a statute similar to that now being considered and which in part provided:

"No corporation, either foreign or domestic, engaged in the business of producing or refining petroleum or coal oil, or the products thereof, for illuminating purposes, shall have the right to sell said commodities within the territory of New Mexico, until a license has been issued by said Territorial Commerce Commission, authorizing such corporation to engage in the business of selling and disposing of such products * * *."

B. G. Wilson, as agent of Continental Oil Company of Iowa, without procuring the license required by this statute, continued the conduct of business as theretofore, and was committed to answer the charge of violating said statute. Thereupon he sued out a writ of habeas corpus and the cause was heard upon an agreed statement of facts.

The Wilson case is reported in 10 New Mexico, 32, 48 L. R. A. 417.

In discussing the question, at page 420 of the last named report the court said:

"The scope and effect of the commerce clause of the Constitution of the United States has been a much-mooted question before the courts, both state and Federal, ever since early in the century, and the number of cases involving this important provision have constantly increased down to the present time. Without attempting to review, or even cite, the numerous cases involving the question under consideration, we think there are certain principles, firmly established by the Supreme Court of the United States, which are

decisive of this case, and which may be stated as follows: (1) Commerce between a state and territory is 'commerce among the several states,' within the meaning of the Constitution. *Stoutenburgh v. Hennick,* 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256. (2) The right to conduct interstate commerce includes the right to sell in original packages the goods which are the subject of such commerce, free from state regulations. *Gibbons v. Ogden,* 9 Wheat. 1, 6 L. ed. 23; *Brown v. Maryland,* 12 Wheat. 419, 6 L. ed. 678; *Leisy v. Hardin,* 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Schollenberger v. Pennsylvania,* 171 U. S. 1. 43 L. ed. 49, 18 Sup. Ct. Rep. 757. (3) A state statute imposing a license tax upon the conduct of interstate commerce is a regulation of such commerce and invalid. *Leloup v. Port of Mobile,* 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Lyng v. Michigan,* 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Crutcher v. Kentucky,* 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851. (4) A license may not be demanded of a foreign corporation or person engaged in interstate commerce for the privilege of conducting the same, nor may the same be prohibited notwithstanding a like tax may be exacted for domestic business covering the same articles, and notwithstanding such domestic business may be prohibited. *Crutcher v. Kentucky,* 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Schollenberger v. Pennsylvania,* 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Powell*

v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas,* 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. (5) A state may tax or license a business wholly within the state, notwithstanding the person or corporation engaged in such business may also be, either incidentally or principally, engaged in interstate business, so long as the license or tax does not refer to, and is not imposed upon, the business which is interstate. *Osborne v. Florida,* 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214. (6) But where a license tax is laid generally upon the conduct of the business in all forms, and without distinction as to whether it is interstate or local, and where the tax which is laid upon local business cannot be separated from that which is on interstate business, the whole tax is in contravention of the Constitution, and void. *Crutcher v. Kentucky,* 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Western U. Teleg. Co. v. Alabama State Bd. of Assessment,* 132 U. S. 473, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Ratterman v. Western U. Teleg. Co.,* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup v. Port of Mobile,* 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Osborne v. Florida,* 164 U. S. 650, 655, 41 L. ed. 586, 587, 17 Sup. Ct. Rep. 214.

Applying the foregoing principles to the facts in this case, it seems clear that section 2 of the act of the territorial legislature under consideration is in contravention of the provisions of

the Constitution, and void, so far as it applies to the business of the petitioner as agent of the Continental Oil Company. The petitioner, as such agent, is engaged in the business of buying coal oil, from the producers thereof, without the territory, and shipping the same into the territory for distribution and sale. Coal oil is a recognized article of commerce, and, as such, entitled to the protecton of the commerce clause of the Constitution. The sales of the petitioner are largely in original packages, and, as such, not subject to a license tax. It is true that the act provides for a like license for the sale of oil produced within the territory, but this fact does not take the business of the petitioner, which is interstate, out of the protection of the Constitution."

We submit, therefore, that the New Mexico statute of necessity must fall as being a direct burden upon interstate commerce and in violation of the Commerce Clause of the Federal Constitution.

Respectfully submitted,

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Denver, Dec. 1, 1919.

APPENDIX.

AN ACT PROVIDING FOR AN EXCISE TAX UPON THE SALE OR USE OF GASOLINE AND FOR A LICENSE TAX TO BE PAID BY DISTRIBUTORS AND RETAIL DEALERS THEREIN; PROVIDING FOR COLLECTION AND APPLICATION OF SUCH TAXES; PROVIDING FOR THE INSPECTION OF GASOLINE AND MAKING IT UNLAWFUL TO SELL GASOLINE BELOW A CERTAIN GRADE WITHOUT NOTIFYING PURCHASER THEREOF; PROVIDING PENALTIES FOR VIOLATIONS OF THIS ACT AND FOR OTHER PURPOSES.

H. B. No. 298 (as amended); approved March 17, 1919.

Be it Enacted by the Legislature of the State of New Mexico:

Section 1. DEFINITIONS. As used in this Act: The word gasoline means (a) the volatile substance produced from petroleum, natural gas, oil shales or coal, heretofore sold under the name of 'fiasoline;' (b) any volatile product or substance of not less than 46 degrees Tagliaube's Baume test derived wholly or in part from petroleum, natural gas, oil

shales or coal; (c) any other volatile product or substance of not less than 46 degrees Tagliaube's Baume test, sold or used for producing motive power for internal combustion engines, or for producing power for propelling motor vehicles.

The word *person* means and includes all persons, corporations, firms, co-partnerships and associations.

The term *distributor of gasoline* means every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this State.

The term *retail dealer in gasoline* means a person, other than a distributor of gasoline, who sells gasoline in quantities of fifty gallons or less.

Sec. 2. LICENSE TAXES. Every distributor of gasoline shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency.

Every retail dealer in gasoline shall pay an annual license tax of five dollars for each place of business or agency.

Such license taxes shall be payable on or before the first day of June, 1919 (for the half year ending December 31st, 1919), and thereafter on or before the first day of December for each succeeding calendar year.

It shall be the duty of every person intending to deal in gasoline to make application to the Secretary of State for such license certificates, stating whether he intends to engage in such business as a distributor

or retail dealer and at the time of submitting such application to pay the license tax as herein provided. License certificates for persons commencing business after July 1st in any year may be issued for a half year upon payment of half the annual license tax herein provided.

It shall be unlawful for any person to distribute or sell gasoline after July 1st, 1919, without having paid the said license tax and without having at all times conspicuously displayed at his place of business or agency a license certificate evidencing the payment of such license tax for the then current year or fraction thereof.

Every application for license shall be accompanied by remittance to the Secretary of State of the amount of such license fee. The net proceeds of all license fees received by the Secretary of State in any month derived from the licenses herein provided shall be deposited with the State Treasurer on or before the tenth day of the following month, to be credited to the State Road Fund.

Sec. 3. There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this State after July 1st, 1919, which tax shall be paid as hereinafter provided at the rate of two cents per gallon upon all gasoline so sold or used.

On or before the tenth day of each calendar month, commencing with the month of August, 1919, every distributor of gasoline shall render to the State Auditor a true statement in such form as shall be prescribed by the Auditor, of all gasoline received and sold, distributed or used by such gasoline distributor

during the preceding month, accompanied by remittance of an amount of money equal to a total of two cents per gallon for all gasoline sold, distributed or used during the month, which amount shall be paid over to the State Treasurer. Such statement shall also show from whom the gasoline so received was purchased or shipped. A duplicate of such statement shall also be forwarded by such distributor at the same time to the district inspector for the district in which such gasoline distribution place of business or agency is located.

Sec. 4. On or before the tenth day of each calendar month every retail dealer in gasoline shall render to the State Auditor a true statement, in form prescribed by the Auditor, of all gasoline received, sold and used by such dealer during the preceding month, which statement shall show from whom such gasoline was purchased; a copy of such statement shall also be forwarded by such dealer to the district inspector for the district in which such dealer's place of business is located. If any of the gasoline sold or used by any such dealer was purchased from any other person than a licensed distributor in this State, said dealer shall at the time of making the return accompany the same by a remittance of an amount of money equal to a total of two cents per gallon upon such gasoline sold or used to be paid over to the State Treasurer.

Any such distributor or dealer who shall fail to make such return or statement, or who shall make any false return or statement, or refuse, neglect or fail to pay the tax upon all sales or use of gasoline as

herein provided, or who shall knowingly sell, distribute or use any gasoline without the tax upon the sale or use thereof having been paid or provided for as herein required shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each offense and in addition to such punishment shall forfeit the license and right to carry on such business and shall not again be permitted to engage in such business in this State until after one year from the date of such conviction.

Any distributor or dealer who shall fail or refuse to make such return, or fail to pay the taxes herein provided for, or who shall make any false return hereunder, shall be enjoined in an action brought in the name of the State from further distributing or selling gasoline in this State until he shall have complied with the provisions of this Act or until after one year from the date of conviction for any violation thereof.

If any tax imposed under the provisions of this act shall not be paid when due there shall be added thereto a penalty of five per cent of the amount thereof and the said tax and penalty shall bear interest at the rate of one per cent per month until paid. It shall be the duty of the State Treasurer to cause suit to be brought in the name of the State to collect such delinquent tax and penalty and interest and it shall be the duty of the Attorney General or any district attorney to commence and prosecute such suit at the request of the Treasurer.

Sec. 5. It shall be unlawful for any person (except tourists or travelers to the extent hereinafter provided) to use any gasoline not purchased from a licensed distributor of gasoline or retail dealer in gasoline in this State without paying the tax at the rate of two cents per gallon upon the use thereof.

Every person who shall use any gasoline not purchased from a licensed distributor of gasoline, or licensed retail dealer in gasoline in this State, shall, on or before the tenth day of each calendar month render to the State Auditor a true statement of all gasoline so purchased and used during the preceding month and shall at the time of making such return accompany the same with remittance of an amount of money equal to a total of two cents per gallon upon all gasoline so used, which amount shall be paid over to the State Treasurer.

It shall be unlawful for any person to knowingly use any gasoline without the said excise tax upon the sale or use thereof having been paid or provided for according to this Act; Provided, that any tourist or traveler coming into the state in a motor vehicle may bring into the State in such vehicle and for his own use only not more than twenty gallons of gasoline at one time and use the same without payment of tax thereon.

Sec. 6. INSPECTORS: DUTIES: The Governor shall appoint one inspector for each of the eight judicial districts of the State, and such inspectors shall hold their offices during the pleasure of the Governor.

Such inspectors shall see to the enforcement of the provisions of this Act, and shall be authorized to examine the books and accounts of all distributors of gasoline or retail dealers in gasoline or warehousemen or others receiving or storing gasoline and of railroad or transportation companies, relating to purchases, receipts, shipments or sales of gasoline.

Each inspector shall receive a salary of one hundred and fifty dollars per month, which shall include necessary traveling expenses actually incurred while performing the duties of his office.

Such salary and expense bills shall be paid and vouchered in the same manner as the salaries and expenses of other state employes, and shall be paid out of the State Road Fund.

Every such inspector shall take and subscribe the oath of office prescribed by the Constitution, and shall furnish and file with the Secretary of State a surety company bond in the sum of two thousand dollars in form to be approved by the Attorney General.

Sec. 7. It shall be unlawful for any public garage owner, operator or any distributor of gasoline or retail dealer in gasoline, or any other person, to sell gasoline of a lower grade than 46 per cent or degrees Tagliaube's Baume Test, or gasoline adulterated with water, kerosene or other substance, without first notifying the purchaser by a statement stamped or stenciled on the package or delivered to the purchaser, stating the true grade of such gasoline or the fact of such adulteration.

Sec. 8. Any person who shall engage or continue in the business of selling gasoline without a license

or after such license has been forfeited as provided in this Act, or who shall fail to render any statement required by this Act, or make any false statement therein, or who shall violate any other provision of this Act, the punishment for which has not been hereinbefore provided, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment.

Sec. 9. The State Treasurer shall set aside from the license fees and the taxes collected under the provisions of this Act a sufficient sum each year to pay the salaries and traveling expenses of the inspectors as herein provided, which salaries and expenses shall be paid in the manner provided by law for payment of salaries and expenses of other State officers and employes; the balance of the moneys so received from such collections shall be placed to the credit of the State Road Fund to be used for construction, improvement and maintenance of public highways.

Sec. 10. That it is necessary for the preservation of the public peace and safety of the inhabitants of the State of New Mexico that the provisions of this Act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist and this Act shall take effect and be in full force and effect from and after its passage and approval."